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THE CONTRIBUTIONS OF THE LANDED MAN TO CIVIL LIBERTY

Williams College

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Number 1

THE CONTRIBUTIONS OF THE LANDED MAN TO CIVIL LIBERTY

BY

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INTRODUCTION

THIS is the first essay of a series to be known as "David A. Wells Prize Essays." These essays are to be printed under the direction and editing of the David A. Wells Professor of Political Science, of Williams College, and one is to appear during each year following an award of the prize. The prize is $500 "in gold coin of standard weight and fineness, or in the form of a medal of gold suitably inscribed, at the option of the recipient." Competition is confined to those who are members of the Senior Class when the subject for an essay is announced, and to graduates of not more than three years' standing.

The following provision of the will of the late David A. Wells, the founder of the competition, governs the committee in the selection of subjects and in the consideration of essays:

"No subject shall be selected for competitive writing or investigation and no essay shall be considered which in any way advocates or

defends the spoliation of property under form or process of law; or the restriction of commerce in times of peace by Legislation, except for moral or sanitary purposes; or the enactment of usury laws; or the impairment of contracts by the debasement of coin; or the issue and use by Government of irredeemable notes or promises to pay intended to be used as currency and as a substitute for money; or which defends the endowment of such 'paper,' 'notes' and 'promises to pay' with the legal tender quality."

HENRY LOOMIS NELSON,
David A. Wells Professor of Political Science.

Williams College,
Williamstown, Mass., April 1, 1905.

AUTHOR'S NOTE

As long as some of the earlier phases of English constitutional history remain so obscure as to be the subjects of diverse opinions, no study of a special influence in that history can be definitive. Yet it may prove of some interest, if not of profit, to get even an incomplete view of the parts played by different classes of men in the development of free institutions. This paper is an attempt to set forth some of the main contributions of the landed man to constitutional growth. The author makes no claim to originality; he has merely made a brief review of the salient features of constitutional history and collated facts stated and opinions expressed by others, but in such relation, he trusts, that the importance of this particular influence may be somewhat apparent. No attempt has been made to trace any other influence, much less to compare this with any other. The result is a lack of proportion of which the reader will scarcely need to be warned. If the author succeeds, how-

ever, in emphasizing the fact that to the landed man we owe a very large share of the liberty we now enjoy, the purpose of this study will be answered.

The author desires to make acknowledgement for valuable criticism and suggestions received from Professor Henry Loomis Nelson, of Williams College, and to Dr. W. B. Munro, late of the same college, but now of Harvard University. He is indebted to Arthur H. Chase, Esq., librarian of the New Hampshire State Library, for courtesies extended, also to Hon. Charles R. Corning, of Concord, New Hampshire, for access to his private library. The libraries of Harvard College and the Harvard Law School have also been freely drawn upon. The works consulted are amply cited in the foot-notes.

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I

THE ANGLES AND SAXONS ON THE CONTINENT

The roots of English institutions strike under the Channel and into Continental soil. Here, among the German tribes whose hardy sons in the fifth century began to conquer the island, we must seek the origin of those customs whose growth, as influenced by the landowner, we are to attempt to trace. Of Celtic and Roman institutions nothing of importance is discernible in later England. The inhabitants of the island at the close of the Roman occupation, says Lappenberg, were not Romanized; on the contrary, the descendants of the conquerors had become assimilated to the Britons.[1] Rome never wholly prevailed, never entirely expelled the old British institutions. Whatever savored of Rome was annihilated by the gradual wane of the imperial rule. The Saxons found only Celtic institutions and allowed only the politically unimportant of these to survive.[2] Free-

[1] 1 Lappenberg, *History of England under the Anglo-Saxon Kings* (Thorpe's Translation, Otté's revised ed. London, 1881), 157.

[2] 2 Lappenberg, 430.

man argues the practical extermination of the Britons by the Saxons and the extinction thereby of all Romano-Celtic institutions.[1] Stubbs concludes that "the Teutonic element is the paternal element in our system, natural and political,"[2] and that the English possess "the elements of primitive German civilization and the common germs of German institutions."[3] There are those who take the contrary position that the Teutonic influences are not predominant, but they have their case yet to prove. In accordance with what seems the more accepted view, we will begin our study with the German origins.

There are given us two sources of written information concerning our German ancestors and their customs. These are the *Commentarii de Bello Gallico* of Cæsar and the treatise *De Situ, Moribus et Populis Germaniae* of Tacitus. Let us inquire what they have to tell us, for some knowledge of the system they disclose will be of value in following later developments.

In the first place we shall be curious as to the nature of property in land, for it is about

[1] 1 Freeman, *Norman Conquest*, 16–20.

[2] Stubbs, *Select Charters* (8th ed.) 3.

[3] Stubbs, *Constitutional History of England*, § 1.

the landowner that our interest at present centers. Cæsar notes that the Germans devoted their whole life to hunting and warfare.[1] They did not give close attention to agriculture, and most of their food consisted of milk, cheese, and flesh. Nobody had a field with a fixed boundary, but the magistrates and chiefs each year gave the tribes and families as much land as they thought fit and the year after forced them to move.[2] Concerning the Suevi, the most warlike nation, Cæsar has much the same things to relate. They had no private and separate fields, nor were they permitted to remain in one place for the purpose of residence more than one year. Like the rest of the Germans, they did not live much on corn, but for the most part on milk and flesh. They were given greatly to hunting.[3]

If we are to accept this account as true, we must conclude that in the first century before Christ the Germans were a practically nomadic race, for only as such would they give almost no attention to agriculture, have no fixed bounds to their fields, live on the produce of the herd, spend their whole life in hunting and

[1] Cæsar, *De Bello Gallico*, vi, 21.
[2] Ibid. vi, 22. [3] Ibid. iv, 1.

warfare, and yearly move from place to place. If they were nomadic, there would naturally be no property in land, and the yearly allotment would be merely a matter of temporary convenience and conducive to domestic peace, not an indication of ownership in anybody.

But the correctness of Cæsar's story at this point is open to serious questioning. Cæsar himself raises a doubt in our minds, for he tells us that both the Germans in general and the Suevi in particular were accustomed to lay waste their borders as widely as possible, so that they might be protected from hostile incursion.[1] Such a defense would hardly be needed by a nomadic people, and the German states must have had fairly settled seats or they would never have made use of it. A century later than Cæsar, another historian gives us a picture of the Germans which is not that of nomads. As one hundred years could hardly measure the transition from one state to another, we have another reason for concluding that Cæsar erred, and that we must not draw inferences from him as to German occupation and ownership of land. Dr. Stubbs thinks that Cæsar depended more upon hearsay than upon personal

[1] Cæsar, *De Bello Gallico*, vi, 23, iv, 3.

observation, and that certain comparatively primitive German conditions were in his mind exaggerated by contrast with Roman institutions.[1]

We therefore resort to Tacitus for information as to ownership of land among the Germans; but not even here do we find an answer to our question. The later writer was subject to somewhat the same limitations as was Cæsar. While he may have spoken after a closer and more personal study of the Germans than did his predecessor, we must remember, with Dr. Stubbs, that quite unintentionally he would lay undue emphasis upon features of Teutonic life which contrasted with Roman customs. The generality and vagueness of the record should also make us cautious.[2]

Tacitus, while telling us that the food of the Germans consisted of wild fruit, flesh, or thickened milk,[3] gives us a picture of a more agricultural people than does Cæsar. We learn that while there were no cities or compact towns there were villages,[4] which indicates a settled

[1] Stubbs, *Sel. Chart.* (8th ed.) 52.

[2] Ibid. 54.

[3] Tacitus, *De Situ, Moribus et Populis Germaniae*, c. 23.

[4] Ibid. c. 16.

people, not nomads. The land must have been cultivated, for caves were used for storing the fruits of the earth,[1] and serfs paid a sort of rent in grain.[2] Among a people given in some degree to agriculture we look for a system of land-ownership, but while the Germans undoubtedly had a land-law, we meet difficulties in defining it satisfactorily.

Upon a passage of Tacitus and a number of continental charters, a theory has been built up, which, under the name of the "mark system," has met with a very general acceptance for a half century. Without going deeply into detail, it may be enough to say that the distinctive feature of this system, as it affects our inquiry, is communal ownership of the land. Let us look at the words of Tacitus. "Agri pro numero cultorum ab universis vicis occupantur, quos mox inter se secundum dignationem partiuntur. Facilitatem partiendi camporum spatia praestant. Arva per annos mutant, et superest ager." [3] From these words there has been argued an ownership of land by village communities at a period prior to that of individual ownership, and an annual apportionment for purposes of cultivation. But

[1] Tacitus, *De Situ, Moribus et Populis Germaniae*, c. 16.
[2] Ibid. c. 25.
[3] Ibid. c. 26.

it is to be observed that no word directly indicating *property* is used. The land was *occupied* by villages in proportion to the number of cultivators, and was divided according to the rank of the occupants. It should be no cause of surprise to find the cultivators collected into villages, and we are not to jump to the conclusion that the villages owned the land. Nor is it strange that there should be some proportion between the number of cultivators and the size of the plots they occupy; that would seem a natural economic arrangement in a thinly settled country. As Tacitus put it, "Facilitatem partiendi camporum spatia praestant." Too much weight should not be given the words *partiuntur* and *partiendi;* they do not necessarily indicate a frequent and active *dividing*, and may refer only to the settled *division* which Tacitus saw. That the Germans changed their arable from year to year may point to a mere rotation of crops and fallow, which would naturally result in land "left over."

We have already rejected Cæsar as a very trustworthy authority as to property in land, but even accepting his statements that the magistrates and chiefs each year assigned to tribes and families as much land as they saw fit, and

forced them to move the next year,[1] and that the Suevi were not permitted to remain in one place for purposes of cultivation more than one year,[2] — even accepting these statements to indicate anything as to landownership, do they not prove ownership by the chiefs of the cantons and arbitrary disposal as the chiefs think fit, as readily as they prove communal ownership?[3]

The theory of property in the village community seems, therefore, an inference which, to say the least, it is quite unnecessary to draw from the ancient writers. Within a few years the doctrine has been ably criticised, and is no longer to be accepted as a matter of course. M. Fustel de Coulanges, in *The Origin of Property in Land*, examines the few charters upon which the theory is based, and considers the analogies supposed to be found among all races. His conclusion is that it rests upon entirely insufficient historical grounds. Professor Maitland has given the subject some attention,[4] and finds "no proof that among the Germans the land was continuously tilled before it was owned

[1] Cæsar, *De Bello Gallico*, vi, 22.

[2] Ibid. iv, 1.

[3] Fustel de Coulanges, *Origin of Property in Land* (London, 1892), 5.

[4] Maitland, *Domesday Book and Beyond*, 340–356.

by individuals or by those small groups that constituted the households." [1] The evidence points, he thinks, to some coöperation in agriculture, but not to a communistic division of the fruits. The community did not reallot arable strips; it sought only to regulate the rotation of crop and fallow. Meadows, pasture, and woodland were indeed often held in common, but rights of common may be appurtenant to individual property and partake of the nature of individual property.[2] Professor Maitland ventures to guess that if there was any "mark community," it was not a village community, but one whose members dwelt in many different villages and exercised rights in common over woodland which lay between those villages, and that, if any trace of such a community is to be found in England, it is in the common of vicinage.[3] But "we are among guesses and little has as yet been proved," [4] hence it would be rash to declare what was the German system of property in land. Though it follows that we can say nothing of the contributions of the landed man to civil liberty in the Teutonic period, it will nevertheless be useful to get a brief view

[1] Maitland, *Domesday Book and Beyond*, 346.
[2] Ibid. 346–348. [3] Ibid. 354, 355. [4] Ibid. 340.

of Germanic governmental institutions, for we wish to know what it was upon which the land-owner later exerted his influence. For this we return to Cæsar and to Tacitus.

We naturally look first for the sovereign. Cæsar tells us that in times of war magistrates were chosen with power of life and death, but that in times of peace there were no common magistrates, the chiefs of the various subdivisions administering justice.[1] Tacitus speaks of kings,[2] but their field of influence was very limited. They are nowhere mentioned as military commanders; indeed, kings were chosen for their nobility, generals for bravery. The kings are explicitly said not to have an unlimited or free power.[3] In the council of the state they had no superior voice, for there they were heard only in proportion to their power of persuasion, not of commanding.[4] They might receive a part of the fine of the criminal, but we do not hear of their having any preëminent position in the administration of justice.[5] Except to a king of unusual endowments, the office meant no more than a simple

[1] Cæsar, *De Bello Gallico*, vi, 23.
[2] Tacitus, *Germ.* cc. 7, 11, 12.
[3] Ibid. c. 7.
[4] Ibid. c. 11.
[5] Ibid. c. 12.

honor.[1] In other words, the "king," if he were a surpassingly able man, might make himself a real king, but Tacitus does not suggest his ever being more than a mere figure-head for the nation. Furthermore, the office was not universal among the German states, for we hear of "tribes which are under kings," in apparent distinction from those which are not.[2] Bede, writing of a missionary journey in the year 690 to Friesland, said: "The Old Saxons have no king, but a number of satraps over their state, which satraps upon the happening of war cast lots. While the war lasts they follow as general the one upon whom the lot falls, and him they obey; but as soon as the war is over all the satraps again become of equal power."[3] We are therefore constrained to the opinion that if in some tribes the Germans did have "kings," they were merely imitations of the kings of their neighbors, bearing but an empty name.[4] There was no king in the sense in which the term is commonly used. We therefore look elsewhere for the sovereign power, and find it seemingly in the people.

[1] Stubbs, *Const. Hist.* § 15. [2] Tacitus, *Germ.* c. 25.
[3] Bede, *Historia Ecclesiastica Gentis Anglorum*, v, 10.
[4] Stubbs, *Sel. Chart.* (8th ed.) 4.

In public business the voice of the people was finally decisive. For convenience' sake the chiefs alone passed upon the smaller affairs, but concerning the greater all consulted after the chiefs had first considered them. The king or chief might have a superior influence in the council only by his powers of persuasion. Those powers might depend a great deal upon his rank, the liking in which he was held, or his prowess in war, as well as upon his wisdom and eloquence; but nobody in council spoke with authority which must be obeyed. The people might express their displeasure by groans or their pleasure by the clashing of spears. The council sat armed.[1] This suggests that the "sovereign people" comprised only the fighting men, a thing easily understood in so primitive a race. "They do no business either public or private unless they are armed. But it is not the custom for any one to assume arms before the state has approved his ability. Then in the council itself either one of the chiefs, or the father or a relative, arms the youth with shield and javelin. This among them is the 'toga,' and this the first honor of young manhood; before this they are considered a part of the home, afterwards a part of the state." [2]

[1] Tacitus *Germ.* c. 11. [2] Ibid. c. 13.

This popular assembly of armed men, besides performing the administrative and legislative functions which involved consultation, acted as a court of justice in capital cases. Penalties were proportioned to the offense, and ranged from hanging for traitors to fines in horses and cattle for smaller crimes. The fines were divided between the state (or the king, if there were one) and the injured party or his family. The assembly also elected the chiefs, a part of whose duties was the administration of justice in the subdivisions of the *pagus* and town. As a support to his authority and as advisers, each chief was assigned one hundred men from the people,[1] who thus had a direct hand in local justice, and perhaps also in local administration.

The expenses of government must have been comparatively light. Royalty, where existent, had not attained a position requiring the fiscal support of the people. The so-called king had his private property and his share of court fines, which probably sufficed for him.[1] The chief had the larger proportional share of land to which his rank entitled him, and any lack which this left unsatisfied must have been supplied

[1] Tacitus, *Germ.* c. 12.

by the voluntary gifts of flocks and products of the field, which it was the custom of the people to give him.[1] The judicial department was cared for by the fines, and the expenses of the assembly must have been small aside from the cost of attendance borne by each man. There was little occasion for a tax, and we hear of none.

We find in this a very incomplete picture, but there are details sufficient to show us a collection of tribes united by blood and custom, though not by a common government, under a system whose distinguishing feature was that the authority rested in the people, or at least in the armed men. It was with these popular institutions that the Anglo-Saxons went to England in the fifth century. Let us see what became of them upon British soil.

[1] Tacitus, *Germ.* c. 15.

II

THE ANGLO-SAXONS IN ENGLAND

THE most striking change wrought by the migration was the rising of kings over the various states, kings in fact as well as in name. Probably this was not an instantaneous process, for while a nominal king might be set up in a day, the centering of power in royalty would, among a democratic people, be of slower growth. However this may be, it is certain that there came a new tendency, important because in opposition to the popular government which had been the real essence of Teutonic institutions. Forecasts of this tendency have been seen before the Anglo-Saxons left the Continent, but we now observe it clearly defining itself.

Why was it that the Germanic tribes crossed the Channel without kings, but on British soil became subject to them earlier than did the kindred Saxons and Frisians who remained upon the Continent?[1] The reasons must ap-

[1] 2 Lappenberg, 375.

parently be sought in the migration and in the different local conditions. The invasion entailed a more sustained war than was common at home, and against a new and untried foe. As a consequence the commanding general must have had, if possible, more plenary powers than at home. On account of the length of the war, these powers would be exercised for an unusual term, and the *dux* or *heretoga* would become somewhat settled as the head of the state, perhaps arrogating to himself civil authority as well as military during the time of war, and retaining it when hostilities ceased. The situation in which the Anglo-Saxons found themselves, constantly in danger from the Scots and Picts, must have secured the people's acquiescence in a change which made for their safety in unifying the tribes. Probably the very migration and conquest had also brought about a feeling of unity among the people of each tribe or state which had never been theirs upon the Continent, and which found in royalty a welcome expression. And they were nations not merely in feeling, but also in fact, and as such members of the world's family of nations, with whose kings only a king was dignified enough to deal.[1]

[1] Stubbs, *Const. Hist.* § 32.

The national feeling spoken of does not mean that the Anglo-Saxons at once became a single nation extending over all England. Each German state, as it came from the Continent, retained its identity, but the tribes of which it was composed each caught a sentiment which cemented it into a firmer state with the qualities of a nation. Thus there were in England a number of kingdoms. Some of them were of no wider extent than the later shire, some were larger; but the more powerful absorbed the weaker or forced their allegiance, until finally the seven or eight kingdoms remaining were united under one preëminent royal house. During this process of aggregation, as Mr. Taylor terms it,[1] the royal power steadily gained until it became the expression of the real national unity of all England.

One man put thus in a place of power over even a free people will accumulate authority. So we shall not be surprised to see the people lose much of the political rights which they had exercised. This was the inevitable result of the building of a compact nation upon a groundwork of conquest, but it was not wholly

[1] 1 Hannis Taylor, *Origin and Growth of the English Constitution*, 176.

deplorable. Much of what the people lost in individual rights came back to them as gain in collective solidarity, and this solidarity they firmly kept while later winning back their pristine rights. Nor were those rights ever wholly lost, especially in local affairs. There were checks to the king's assumption of power. The share of the landed man in the checking of royal prerogative is the subject of our inquiry, hence we must digress from our main story long enough to look at the system of landholding in Anglo-Saxon England.

Whatever may have been the case in earlier times, absolute ownership of the land in severalty became the rule in England.[1] Of tenures there were two main kinds, by book-right and by folk-right. Book-land was land held under charters or books granted by the king, mostly to bishoprics and religious houses, but sometimes to lay nobles. The grant probably made no difference in the occupation of the land, but simply carried lordship and revenues, profits of justice, and rights of jurisdiction. Land held by book was alienable. Folk-land has been thought to be land belonging to the people at large and granted by the king to in-

[1] Stubbs, *Const. Hist.* § 36.

dividuals, though without book or written record. A simpler significance of the term is now preferred by some who consider that it was merely land held by folk-right or by customary law. It was perhaps at first not alienable or disposable by will. The holder owed to the king certain services. A third kind of land was known as laen-land, and was held by the tillers of lords to whom rents and services were paid. Whether or not this tenure resulted from a grant of book-land from the king's grantee to the occupier is not known.[1]

Of more interest to us than the tenure of land is its allotment. Unfortunately we have not the least record of the method adopted in dividing the land, but we may with some degree of certainty suppose that the leader of each conquering state made the apportionment with some relation to the divisions of the host into hundreds, each hundred receiving its own share, the territory of the hundred being allotted to the towns and the sections given the towns and villages parceled out to the households or individuals. Some such process would seem to be necessary in order to make a

[1] 1 Pollock & Maitland, *History of English Law before the Time of Edward I* (2d ed.) 60–62.

peaceable settlement. While some sort of equality may have been observed as respected the various divisions of the host, it is scarcely to be doubted that individuals would receive larger or smaller private estates according to their rank, the favor in which they stood to the leader, and their services in the conquest. "Nobles or other great men received grants of estates, or perhaps attached themselves to the political center on the condition of retaining estates which they had already appropriated." [1]

"The primary element which the law regards is the landowning freeman." [2] "It is as an owner of land, or as a fully qualified 'lawful man,' . . . that the freeman has rights and duties." [3] This landowning freeman was the descendant of the warrior freeman of the Germans; he succeeded to his standing in the community, with the loss of such rights as followed the introduction of royalty. The invading warrior, with the coming of peace, settled down to agricultural pursuits, and in place of the spear, in the time of Tacitus borne in the public assembly, land became the badge of his rank.

It was through the township that this "lawful man" had his first and closest touch with

[1] Stubbs, *Const. Hist.* § 35. [2] Ibid. § 38. [3] Ibid. § 39.

political affairs. The assembly of the town was composed of such freemen. In it were perhaps made the by-laws for the local community. It looked after certain police matters like the pursuit of criminals and the search for stolen goods, it looked to the collection of exactions laid by the courts. But the assembly of the town was not a court; the real judicial work was done in the hundred and shire courts. The head man was the town-reeve, at first perhaps elected by the freemen, later probably appointed by the king or his officer. The town was represented in the courts of the hundred and shire by the reeve and four best men, who may have looked to the town-meeting for instructions.[1]

The division next larger than the township was the hundred, corresponding judicially to the German *pagus*, with its one hundred judges in the court of the chief. The hundred court was held monthly, and was attended by the lords of lands within the hundred or their stewards, and by the priest, the reeve, and the four best men of each township. It had a general criminal and civil jurisdiction.[2]

Superior to the hundred was the shire. At its head stood the ealdorman, who was the

[1] Stubbs, *Const. Hist.* §§ 39–43. [2] Ibid. §§ 45, 46.

princeps or chief of Tacitus and the satrap of Bede. Elected by the national assembly of the Germans, in England he was nominated by the king and confirmed by the witan. He held office for life, unless removed by the power which appointed him. Some sort of hereditary principle also appeared, at least to the extent of limiting the office to the old regal families which had been mediatized in the process of aggregation.[1] The ealdorman was the judicial head of the shire, and had full power to hold pleas and proceed to execution in both civil and criminal cases. He was also the executive and military head of the shire.[2] As one of the higher nobles, he was of course possessed of large landed estates. His position carried with it lands in the shire and the chance to receive gifts for favor and protection.[3] He had a seat in the witan and some share in national legislation and judicature.[4]

Alongside the ealdorman was the sheriff. Originally perhaps elected by the people as the judicial president of the shire, he became

[1] Stubbs, *Const. Hist.* § 49; 2 Kemble, *Saxons in England*, 146–149.

[2] Stubbs, *Const. Hist.* § 49; 2 Kemble, *Saxons*, 136–138.

[3] 2 Kemble, *Saxons*, 140, 141.

[4] 2 Kemble, *Saxons*, 142, 143; Stubbs, *Const. Hist.* § 48.

before historical times the peculiar officer of the king, appointed by the crown without the consent of the witan. To him as the king's steward belonged the collection of the fiscal dues and the general execution of the law. He received, as did the ealdorman, a share of the profits of jurisdiction, and sometimes perhaps had certain land attached to the office.[1]

In the court of the shire, presided over by the sheriff, sat the ealdorman and bishop to declare the law secular and spiritual. The suitors were the same as in the hundred court, all the lords of lands, all public officers, and the priest, reeve, and four men of each town. The suitors were the judges, but in some matters (as the presentment of criminals) the twelve senior thegns came, in both the court of the shire and hundred, to act alone. The shiremoot had the same jurisdiction as the hundredmoot, the declaration of folk-right in every suit; but it was not strictly an appellate court. Indeed the English at this time had no real system of appeal. One could remove his case from the lower to the higher court only when no decision was made; a judgment once given was final. But if a litigant thrice demanded right

[1] Stubbs, *Const. Hist.* § 49; 2 Kemble, *Saxons*, 158–165.

in the hundred court and could get no decision, he could press his suit in the shire court. Similarly, he could resort from the latter court to the king.[1]

After this brief view of the local and more popular branches of the Anglo-Saxon constitution, we may return to the national government and the king. It is probable that, next after the military commandership, it was in what we now call the executive department that the king first gained predominance, for it is the every-day round of official business, the collection of revenue, the control of diplomacy, which most naturally would fall into the hands of the man who embodied the national unity. In the process of aggregation, even if not in the earliest and smallest kingdom, the burden of such duties must soon have become so great as to demand the aid of ministers. These would of course be appointed by the king, and thus arose a body of administrators answerable to the king alone. We shall later meet the system as a serious barrier to the winning of civil liberty by the people.

The king inevitably tended, not merely to express the national unity, but also to attract

[1] Stubbs, *Const. Hist.* § 50.

to himself the functions of government, until he became, at least so far as political activity and power were concerned, almost the nation itself. Thus, as the process of aggregation went on, the popular elements of the government were left largely in the local aggregated parts and did not persist above the shire. As the kingdom could be a nation only if under one law, we find legislation becoming national and passing from the hands of the people. The king claimed to be in some sort the paramount legislator.[1] But the theory of a legislative body was without doubt too strongly impressed upon the race to be entirely lost, and the king, so far as we know, always had his witan, or assembly of wise men. As for the power of that body, something of a problem is presented. No contemporary accounts enlighten us fully as to the practical workings of the king and witan, so we may not know whether in the session the king or his advisory board was the superior power. It is very likely that a strong king could get along with the form of the witan, that he would convene it and declare his will, giving to it the right of a rather hollow assent. A weak

[1] 1 Palgrave, *History of the Rise and Progress of the English Commonwealth*, 648.

king, however, might require something more substantial than formal consent, and seek counsel; it is possible that the witan might at times even make some demands. The initiative, however, must in general have lain with the king.

The earliest specimen of Anglo-Saxon legislation is said to be the collection of dooms which Æthelbert, king of Kent, "established with the consent of his Witan" about the year 600.[1] Nearly a century later Ini promulgated the laws of Wessex, prefaced by the words: "I, Ini . . . with the counsel and with the teaching of Cenred my father, and of Hedde my bishop, and of Eorcenwold my bishop, with all my ealdormen and the most distinguished witan of my people, and also with a large assembly of God's servants, have been considering of the health of our souls and of the stability of our realm; so that just law and just kingly dooms might be settled and established throughout our folk, so that none of the ealdormen nor of our subjects should hereafter pervert these our dooms."[2] In the earlier case the witan gave consent. Did they do more in the later?

[1] 1 Palgrave, *Eng. Com.* 43.

[2] Ini, *Preamble to Laws*, in Stubbs, *Sel. Chart.* (8th ed.) 61.

Cenred and the bishops appear to have first advised Ini. Next the king called together his witan and "considered" with them, which suggests either that Ini listened to their advice or at least questioned them as to various local customs which should be of value in making a code. Apparently there had been a variety of law administered by the various ealdormen, for a settled law throughout the folk seems the object of the dooms. Perhaps, therefore, Ini used the witan only as informants, but probably some sort of consent was also sought in order that the various ealdormen might the more harmoniously support the codified law in cases where it differed from local custom. Even so, the conclusion remains to be drawn from "*my* ealdormen" and the "witan of *my* people," as well as from the promulgation in the king's name, that it was Ini who had the real authority of this legislative body.

Another king of Wessex, two hundred years later than Ini, gives us a somewhat clearer idea of the procedure in the witenagemot. "I, then, Alfred, king, gathered these [laws] together, and commanded many of those to be written which our forefathers held, those which to me seemed good; and many of those which seemed

to me not good I rejected them, by the counsel of my witan. . . . I, then, Alfred, king of the West Saxons, shewed these to all my witan, and they then said that it seemed good to them all to be holden."[1] We have "counsel" spoken of, but the obvious picture is that of the king making the codification as seemed best to him, and then getting the consent of his witan. Of counsel in the sense of advice nothing appears.

We find an institute "which King Eadmund and his bishops, with his witan, made" about 943.[2] Eadgar a few years later ordained "with the counsel of his witan."[3] There exists also an "ordinance which King Æthelred and his witan ordained" somewhere in the vicinity of 1000.[4] We may safely say, therefore, that at times the witan wielded an effective part of the legislative authority. Just what part this was very likely depended, as already suggested, somewhat upon the character of the king. It is also probable that, while there was a see-saw as to the relative power of the king and his

[1] *Laws of Alfred, Preamble*, in Stubbs, *Sel. Chart.* (8th ed.) 62.

[2] Stubbs, *Sel. Chart.* (8th ed.) 67.

[3] *Preamble to Ordinance*, in Stubbs, *Sel. Chart.* (8th ed.) 71. *Æthelred I*, in Stubbs, *Sel. Chart.* (8th ed.) 72.

advisers, there was on the whole a considerable tendency in Anglo-Saxon times toward the strengthening of that of the witan. The charters of the tenth century point that way. Should it be true that the witan at some time was not strictly a legislature, and that the king merely promulgated his edicts amidst his peers and prelates, using the language of command,[1] to which the witan assented as a matter of course, the usage of assent must surely in the long run have ceased to be formal and have become gradually essential. From such a state of affairs it is but a step to the claiming of an equal share in legislation, and when the king retains but a moiety, his prerogative is bound even further to decline. Once the counselors' voices are heard in advice, they will learn to speak with authority. Once authority comes in one measure, it follows in another. Yet the process is the slow one of the centuries.

Who composed this witan in which such potentiality was gathering? To begin with a negative, it was not a folkmoot. As long as the kingdom remained coextensive with the shire, there existed perhaps a national folkmoot side by side with the newer witenagemot,

[1] 1 Palgrave, *Eng. Com.* 638.

but in a kingdom of aggregated shires no folk-moot other than those of the shires was known. In the consolidated kingdom the principle of popular representation in its purity was lost sight of; although constructively the witan represented the rights of the people, its members were not formally there in behalf of the freemen. Now and then, on unusual occasions, — when a king was to be crowned or invasion repelled, — the people assembled at the place where the witan sat, but they were not a part of the legislative body and had no voice other than such as comes from the acclamation of the crowd.[1] Possibly the people acquiesced the more readily in such a loss of power because, when the units of the kingdom were consolidated, it became impossible for all the freemen to attend. Besides the inconvenience and expense of travel, the interest of each man, as the kingdom enlarged, would become more local and provincial, and less national.[2]

As the king could get along with hardly more than the assent or counsel of subjects, he would give place only to such of them as pleased him most or as, because of their power and influence,

[1] Stubbs, *Const. Hist.* § 51.

[2] 2 Kemble, *Saxons*, 191–193.

he found it wise to keep attached to his cause.[1] He had a body ready-made from which to draw such men. Every German *princeps* had his *comitatus* or following of men attached to his cause. They were his distinction in time of peace and his support in time of war; constantly with him, they even sat at his table.[2] To such a body of tried friends the king might well first turn for his administrative officers and for his counselors.

These *comites* or *gesiths* were originally unfree and members of the royal household, but, because of their nearness and services to the king, they were liberally rewarded with grants of land, so liberally indeed that they came to have a better lot than did the landed freemen or even the noble by birth. So well did they thrive that the old nobility were absorbed by the new.[3] The more important gesiths became *thegns*, that is, warrior gesiths owing military duty. A freeman who acquired five hides of land and entered the service of the king became likewise a thegn. On the other hand, the noble by birth, recognizing the superior opportunities which the thegnhood offered, was fain himself

[1] The members of the witan were not elected, but summoned by writ of the king. 2 Kemble, *Saxons*, 201.

[2] Tacitus, *Germ.* cc. 13, 14. [3] Kemble, *Saxons*, bk. i, ch. vii.

to become a thegn, and placed himself in the king's service. The gesiths likewise disappeared, those who did not attain thegnhood becoming mere servants of the king. Thegn came to be the name of the large class of nobility, high and low, who held a certain amount of land and were bound personally to the king by obligation to do military service.[1]

[1] Stubbs, *Const. Hist.* § 65. Whether the possession of five hides of land alone was sufficient to confer thegnhood, is disputed. See Ibid. Lappenberg thought that the origin of thegnship was lost sight of, and that "not alone martial honour, but its external reward [land], was regarded as a foundation of nobility." The same writer gave the rank to the freemen who had certain armor and to the merchant who three times crossed the ocean at his own expense. 2 Lappenberg, 386. Cf. *Of People's Ranks and Laws*, in Stubbs, *Sel. Chart.* (8th ed.) 65. Doubt has been expressed as to the latter being a basis for thegnship. 1 Pollock & Maitland (2d ed.) 34. A man wealthy enough to do so much traveling must, however, have had five hides of land, for land was almost the sole wealth of the day. "It nowhere appears that the mere possession of a fixed quantity of land entitled the owner to the rank of a thegn, but the frequent mention of five hides in connexion with the thegnhood would seem to show that, in addition to other qualifications, a thegn would ordinarily need and obtain from a royal grant an endowment of that extent." Medley, *Student's Manual of English Constitutional History*, 18, 19. It is safe to say that the holding of land, even if not essential, became the rule, and rather obscured the original badge of thegnhood, which was the personal tie of service. The thegns became as a whole a class of larger

When the thegns thus came to be distinguished for landed property as well as for personal relationship to the king, they had added recommendations as candidates for the witan. Among them were found the men of the greatest wealth in the nation, for personal property in Anglo-Saxon times was comparatively very small. Now the wealthy man, who was the landed man, could not well be neglected by the king when he sought support. We are not to think, however, that every landowner was consulted. There were two classes of thegns, the richer and the poorer. The former paid fiscal charges directly to the king; the latter dealt with the sheriff. The distinction was much the same as that between the later *barones majores* and *barones minores*.[1] The richer thegns bore the bulk of the fiscal burdens; they and their

landowners. "The development of the comitatus into a territorial nobility seems to be a feature peculiar to Englith history." Stubbs, *Const. Hist.* § 65. "The possession of land was, even whilst the idea of nationality was mainly a personal one, the badge, if not the basis, of all political and constitutional right. On it depended, when the personal idea yielded to the territorial, the rights and obligations, the rank, value, and credibility of the member of the body politic; it became the basis as well as the tangible expression of his status." Ibid. § 36.

[1] Maitland, *D. B. and Beyond*, 165, 166.

dependants and military followers were a considerable portion of the king's fighting force. If ever policy led the king to seek counselors, surely he would look for them here. On the other hand, if any man were to demand a share in public council, who was more likely to do so than this very thegn to whom the burdens of taxation and military service gave the greatest interest in public business?[1] And where could

[1] Taxation, in the modern sense of the term, did not exist until a very late period in Anglo-Saxon history. Revenue ample for the king and government was furnished by the income from lands owned by the crown, the profits of justice, fines for non-attendance upon military duty, purveyance for the king and his retinue in royal progresses through the realm, wreck, treasure-trove, the produce of mines, and in later times the semi-feudal charges. Stubbs, *Const. Hist.* § 59. All land was subject to the *trinoda necessitas* — military service, the repair of bridges, and the maintenance of fortifications — all personally performed. Stubbs, *Const. Hist.* §§ 36, 46. The modest needs of the young nation required no real tax until the Danish invasions when, to buy off the foe, large sums were raised by a charge called Danegeld, levied on the land at so much a hide. Upon the same basis shipgeld was assessed to provide fleets. To this extraordinary taxation the consent of the witan was necessary. Stubbs, *Const. Hist.* § 56; 1 Taylor, *Eng. Const.* 186, 187; 2 Lappenberg, 210–212. The witan also participated in the determination of war and peace, and in the direction of the fleet and army. Stubbs, *Const. Hist.* § 56. The importance of the landed man getting a hearing in the witan consisted in the fact that there it was that questions so nearly affecting his welfare were decided.

the king look more wisely for advice than to the lords of land who had gained the sharp wits and executive experience of men of affairs in the handling of their property? Even if the king summoned the poorer men, those of the remote districts would not be able to bear the expense of attendance, and their larger landed neighbors would be the only men of the locality actually finding seats in the witan.

While the predecessor of the thegnhood, the *comitatus*, was the class from which the king at first largely drew his witan, the thegns did not constitute the whole body or even the most influential portion of it.[1] They probably had less prestige than the ealdormen and bishops. This may be taken to indicate that all which has been said of them is of small import, but

[1] Besides the thegns, the witan contained princes of the blood and ealdormen. After the introduction of Christianity, archbishops, bishops, abbots, priests, and deacons found seats. 2 Kemble, *Saxons*, 195, 196. It is interesting to note in passing that all of them had large landed interests, although that fact had no influence in placing them in the witan. Princes of the blood were representatives of royalty. Ealdormen were there as members of the old royal families and important public officers. The clergy represented the holy counsel of the church. But though they were not members in any degree because of their land, the fact that they did have land very likely sometimes colored their action in the witenagemot.

so to take it would be erroneous. What we are to fasten to is this: in the witan the only members who in any wise were drawn from the people (as distinguished from the royal or sub-royal families and the church) were the thegns, and these thegns were for the most part men of landed possessions; in later times, perhaps, they owed their presence in the witan partly to the very fact that they had large estates. Though overshadowed by the king and even by other members of the witan, they had present power and the promise of authority in the future; they were the entering wedge of popular legislation.

We have yet to consider the king's part in the jurisprudence of the Anglo-Saxon period. No portion of the popular institutions of the Germans survived the transplanting to English soil so hardily as did the judicial. In the local courts of the shire and hundred, as we have already seen, justice remained at bottom popular, but the new kingship was of too all-absorbing a character not in a large and increasing degree to affect jurisprudence. At first, however, the royal influence would confine itself chiefly to national judicature, leaving the local to retain much of its Germanic purity; but after a time the im-

press of the king would be felt from above and justice would become royal.

Over his *comitatus* the king would very shortly acquire a jurisdiction; they would be under his protection. If the king called his people to him, they came under the same protection, and "if any one there do them evil, let him compensate with a twofold *bot* [the fine paid to the injured man or his family] and fifty shillings to the king."[1] Under Ini, if a man fought in the king's house both life and property were at the king's mercy, and *bot* was to be made for violation of his castle at one hundred and twenty shillings.[2] By Alfred's time, treason was *bot*-less; plotting against the king's life or harboring exiles was a capital offense.[3] If a man fought before a king's ealdorman in the *gemot* or drew his weapon in folkmoot, special penalties were fixed.[4] Contempt in the popular court was becoming contempt of the king's officer or of the king. This points to the court itself becoming the king's. The king thus gradually extended his peace from per-

[1] Æthelbert, c. 2, in Stubbs, *Sel. Chart.* (8th ed.) 61.
[2] Stubbs, *Const. Hist.* § 71; *Sel. Chart.* (8th ed.) 62.
[3] Alfred, c. 4, in Stubbs, *Sel. Chart.* (8th ed.) 62.
[4] Ibid. c. 38.

sons actually in his presence to those constructively so situated. This peace differed from the old national peace, for the breach of which one half of the fine went to the German state and one half to the injured party or his family.[1] So it differed from the early English national peace, the fine of which was similarly divided between the king and the injured party. Of this national peace the king was indeed guardian, but it was distinct from that private peace which was a protection of those who were under his eye. Imperceptibly this latter peace was extended from the king's household to his highways, from person to person and place to place, until all England was within it. Then the enforcement of law lived and died with the king and was suspended during an interregnum. Inseparable from the enforcement of the king's peace was the exercise of jurisdiction, so that its final prevalence made the king "the supreme judge of all persons and over all causes, limited however by the counsel and consent of his witan."[2]

With the sovereign as the fountain of justice, the old hundred and shire courts became quasi-royal courts, in which the sheriff and

[1] Tacitus, *Germ.* c. 12. [2] Stubbs, *Const. Hist.* §§ 71, 72, 73.

the ealdorman represented the authority of the king. By him they were supported and upheld, and by them he was bound theoretically to see justice done. If a litigant could not there find justice, he applied to the king for judgment.[1] If judicial officers were guilty of maladministration, it was the king only who could right the wrong.[2] While the king had not therefore immediate jurisdiction in common justice, in some special cases he was a judge of the first instance. This was so where both parties were of the highest rank.[3]

Over book-land the king and witan had a special jurisdiction which was of the highest importance. Book-land, it will be remembered, was land granted to a bishopric or abbey or to a lay lord by the king and witan. In many cases probably the land was already the property of the grantee, and the only result of the booking was the freeing of the land from all charges except the *trinoda necessitas*. This would mean that included in the exemptions were the profits of justice which had belonged

[1] Eadgar, *Secular Ordinance*, c. 2; Cnut, *Secular Dooms*, c. 17; in Stubbs, *Sel. Chart.* (8th ed.) 71, 73.

[2] 2 Kemble, *Saxons*, 41.

[3] Ibid. 45; Æthelred III, c. 11, in Stubbs, *Sel. Chart.* (8th ed.) 73.

to the king. Even when the title to the land itself passed by the booking, it passed with this exemption. With the profits of jurisdiction went almost inseparably the jurisdiction itself, the *sake* and *soke*. The grant, to be sure, gave only the right to receive a portion or the whole of the court fines, and made no mention of the right to hold the court, but the lord would find it convenient in many, if not most, cases to set up a court of his own. To this no objection would be made, as the question was who had a right to the fines, not who had the court. So seigniorial courts cut into or destroyed many a hundred court. But whether a cause were decided in one court or the other, the procedure was the same, and justice was done by doomsmen who were "lawful men" and peers of the accused. With the exception of criminal cases, which the crown often reserved, some later Anglo-Saxon communities saw a good part of the administration of justice done, not in the folkmoots nor in the king's own courts, but in the courts of landed lords, done, however, by doomsmen who in a manner represented the landed freemen who were the sinew of the people.[1]

[1] Stubbs, *Const. Hist.* § 73; Maitland, *D. B. and Beyond*, 80–107, 283–290.

Let us try to sum up the tendencies of the Anglo-Saxon period. We see kings rising over the German tribes and taking to themselves the usual powers of kings. In the course of time a stronger king rises over the weaker, and we have a united England. This king assumes more and more of the authority which formerly lay in the people. He becomes paramount administrator, legislator, and judge. The ministers of state are his appointees and subject to him alone. The king is not, however, the sole lawmaker; he is subject here to the more or less uncertain check of the witan, which may range from formal assent to occasional demand. But this witan has always real potentiality, even when it is not expressed by present power. The nearest approach to the common people among its members are the thegns, who are for the most part large landowners. These being among the men upon whom taxation and military service most severely fall, we look to them for some influence when the king urges upon the witan an unusual tax or the undertaking of war. In the administration of justice the king, though at first supreme judge of the nation, does not immediately absorb the old popular jurisdiction of the folkmoot, but his officers early become

the president and chief declarant of law, liable only to him; and in time, as the king's peace extends over the whole land, jurisdiction becomes royal. But we observe another tendency. The king grants the fruits of local justice in many places to lords of land, reserving to himself criminal jurisdiction. This tends to make local civil justice seigniorial and to wipe out the old hundred courts. We approach a system in which jurisdiction is divided between the king and the territorial nobility. But through it all, in the local courts there persists the principle of the folkmoot: the doomsmen are landed freemen, probably elected by landed freemen in town-meeting. Thus in witan and local court the only popular influences actual or potential are those which lie with landed men.

III

THE NORMAN CONQUEST AND FEUDALIZATION

LITTLE as there was of popular influence in Anglo-Saxon times, there was to be even greater concentration of power in the king before the processes of liberty could gain momentum. What contributed more than anything else to this further centralization was the introduction of the feudal system and its adaptation to English conditions. Feudalization was the most important and far-reaching effect of the Norman Conquest. Tendencies toward it had been at work even during Anglo-Saxon times, but they were entirely unorganized. Only when William the Conqueror brought over the perfected machinery of continental tenure was the feudal *system* impressed upon England.

The continental feudalism was a compound of land tenure and administration. The king was the lord of all the land, which he had either given from his own estates to his vassals upon certain conditions or had received from the

weaker of them and regranted upon similar conditions. These conditions were that the king should protect and defend the vassal and that the vassal should be ever faithful and ready to fight for the king. Primarily the tenure was military. Secondarily it was administrative, since the lord had jurisdiction over his fief. Now the lord had his own dependent tenants, holding from him as he held from the king, and in like manner the system might extend for several degrees. Thus the circle about the king was broken into smaller circles bound to the head of the nation by the homage and fealty of the lords who were their centers, by the strength of the king, and by the need of the lords. Let the lords thrive and the king become weak, and the ties became the mere threads of conscience represented by the vassals' oaths, which might easily snap and let the smaller circles fly upon tangents. Add to this the similar disruptive tendency of the smaller circle with its own sub-circles, and the possibilities of anarchy became serious.[1]

This system, so far as the tenure of land was concerned, was transplanted to England. Such Anglo-Saxon landowners as did homage to the

[1] Stubbs, *Const. Hist.* §§ 92–94.

Conqueror redeemed their estates and perhaps insensibly found themselves feudal vassals. Those who held out lost their lands entirely and saw them pass into the hands of Norman feudatories. Thus gradually tenure in England became feudal, and for the first time the personal relation between king and subject was overshadowed by the territorial. The king was the paramount landlord of whom every landowner held mediately or immediately.[1]

The tendencies of feudalism in government, being centrifugal, could hardly meet the approval of a conqueror who wished to enjoy the fruits of his conquest. The system of feudal land tenure was the only one familiar to the Norman mind; hence it was retained, but restraints were sought and found which made English administration centripetal and fairly avoided anarchy except when the weakness of Stephen allowed the reins of government to fall loose.

In 1086 William the Conqueror held a great *gemot* at Salisbury. "And there came to him his witan, and all the landowning men of property there were over all England, whosesoever men they were, and all bowed down to

[1] Stubbs, *Const. Hist.* § 95.

him and became his men, and swore oaths of fealty to him that they would be faithful to him against all other men." [1] Nor was this an isolated case, for the Conqueror required "that every free man should affirm by covenant and oath that both within and without England he would be faithful to King William, that he would join with him in holding his lands and honour in all fidelity and would defend him against his enemies." [2] Thus the ties of fealty were made to extend not only to the center of every circle and sub-circle, but to every point of their circumferences. The king had directly a personal, though not a tenurial, hold upon every landowner of the nation.

But it was most of all by means of a better constituted and more centralized administration than England had ever known that the Norman kings combated the disruptive tendencies of feudalism. With a genius for organization they incorporated what was best of Anglo-Saxon and Norman into a government having the source of its strength in the royal power.[3]

[1] *Saxon Chronicle*, A. D. 1086.

[2] *Statutes of William the Conqueror*, 2, in Stubbs, *Sel. Chart.* (8th ed.) 83.

[3] Stubbs, *Const. Hist.* § 117.

Under the feudal system tenure and jurisdiction were hereditary. Moreover they descended by right of primogeniture. The sure tendency of such descent in a government which centered power about the king was despotism, and practical despotism there was in the Norman period. Indeed, Dr. Stubbs believed that if the descent of the kings had been by pure heredity, the forms as well as the reality of ancient liberty would have perished.[1]

In the days when the German *princeps* was the officer of the people and the occasional king the mere representative of the unity of the state, those dignitaries were chosen by the assembly of the freemen. A relic of this remained in the election of the Anglo-Saxon king by the witan. While the kingship was thus elective, it was also hereditary, at least to the extent that the king must be chosen from one family, although he need not succeed by right of primogeniture. Thus within a limited field of candidates the witan might exercise a more or less formal choice. Add to this the power infrequently exercised of deposing the king, and the witan will be seen to have afforded a considerable restraint, which a king aiming at despotism

[1] Stubbs, *Const. Hist.* § 118.

must take into account.[1] Of this restraint the Norman kings were never able entirely to rid the crown, for circumstances did not permit them to claim by hereditary right. Least of all could the Conqueror make such a claim. It is conceivable that he might have made his place firm by mere force of conquest, but his policy was to use pacific methods when possible. He desired the support of the English, and therefore conceded them some things. He sought the election of the witan, received it, and took, as had his Anglo-Saxon predecessors, the oath to rule justly.[2] Hard upon the victory at Hastings as this was, the election must have been granted in fear and trembling, but the Conqueror had retained at least the form of a constitutional restraint.

This elective principle was kept weakly alive by his three successors, none of whom could claim by primogeniture and none of whom was without a competitor for the throne. William Rufus was the second son of the Conqueror. By right of descent the throne should have gone to Duke Robert, who moreover had with him the majority of the barons. But William was the first to arrive upon the field and secured

[1] Stubbs, *Const. Hist.* § 58. [2] Ibid. §§ 95, 61.

the crown from Archbishop Lanfranc after so far bending himself as to take the oath to do justice, to defend the church, and to follow Lanfranc's advice.[1] Nor was this the end of his concessions for the sake of getting the throne. Robert's friends remained active, and William was forced to win over the English by promises of good laws, lighter exactions, and free hunting.[2] A third time, in the fear of threatened death by disease, he made similar promises.[3] While none of these was kept, the king had admitted some answerability to the nation.[4]

Henry I, as third son of the Conqueror, had a title inferior to Robert, but he, like William II, was on the spot before the heir. He therefore received the election of the few barons who were with the late king at his death.[5] This was effected only after some opposition, we are told, but the claims of the man present prevailed over those of the absent heir.[6] Besides taking the coronation oath, Henry, as the price of his

[1] Eadmer, *Historia Novorum*, i, 13, in Stubbs, *Sel. Chart.* (8th ed.) 92.

[2] William of Malmesbury, *Gesta Regum*, iv, § 306, in Ibid.

[3] Eadmer, *Hist. Nov.* i, 16, in Ibid.

[4] Stubbs, *Const. Hist.* § 105.

[5] *Saxon Chron.* A. D. 1100.

[6] Ordericus Vitalis, x, 14; Will. Malm., *G. R.* v, § 393.

crown, issued a charter of liberties, promising freedom from the unjust exactions of the past. It recited that he was crowned by the "common consent of the barons of the whole English realm," [1] and that certain of the provisions were made by the "common consent" of his barons.[2] How far in fact he was from having such a general assent may be indicated by the few who went through the formality of electing him and by the fact that the charter is attested by only the bishops of London and Rochester, the elect of Winchester, the earls of Warwick and Northampton, and four barons.

Stephen could not claim as heir, but made out as good a case as Norman precedent demanded, by being the first person to demand the throne. He too received a formal election, and was crowned, but only the archbishop, the bishops of Winchester and Salisbury, and a very few nobles participated.[3] Stephen followed his uncle in giving charters promising peace and justice as the price of the support of churchmen and barons.

[1] *Charter of Henry I*, c. i, in Stubbs, *Sel. Chart.* (8th ed.) 100.

[2] Ibid. cc. 10, 13.

[3] Will. Malm., *Hist. Nov.* i, § 11, in Stubbs, *Sel. Chart.* (8th ed.) 114.

Now it seems apparent from the facts adduced that the Norman kings after the Conqueror did not depend for their crowns upon the election of any constituted national assembly. What they did was to obtain by promises of reform the support of certain of the clergy and barons. Never, so far as we may observe, was the number who went through the form of election even moderately large. The few at hand or the few whose support was the most important were resorted to. They gave their assent, and the rest of the nation acquiesced. If further support were necessary, the king would promise barons or people certain reforms and then forget them. Nowhere is there apparent a constituted body which serves as the representative of the nation in restraining the king at his accession. The situation is not, however, devoid of hope for liberty, for in it all we see the king tacitly admitting his dependence upon others than himself, even though those others appear in the light of personal adherents to his cause, rather than as the constitutional donors of his crown. Those whom he needed he called upon for help; those who helped him obtained concessions. Here was at least the basis of answerability.

Subject as the king was to practically no constitutional restraint, the officers of state were royal officers, answerable only to him. As in the earliest Anglo-Saxon times the king's administrative helpers were drawn from the *comitatus*, so the sovereign of the Norman period delegated such work as he could not do in person to the members of his household.[1] Foremost of these was the chief justiciar, who acted as vice-king when his master was abroad looking after his continental duchy. This officer became in time, under the king, the head of all the judicial and financial arrangements of the realm. He arose from the necessity under which the king found himself of not allowing the hereditary lords to absorb all the jurisdiction of the kingdom, a necessity which the king met by attempting to gather into his own hands and those of his officers the control of all judicature.[2] The chancellor, in early times one of the chief royal chaplains, was a sort of general secretary of state, the keeper of the royal seal, and the issuer of royal writs. Other important officers were the treasurer, who kept the royal purse and received the sheriff's accounts, and

[1] Stubbs, *Const. Hist.* § 119.

[2] Ibid. § 120.

the chamberlain, who became the royal auditor or accountant. Originally, as has been said, of the royal household, these ministers of state were later appointed from the ranks of the barons. While the strictly household offices became hereditary, the ministers were always named by the king and were entirely dependent upon him for the retention of their places. So distinctly were they royal officers that until the thirteenth century they often obtained their appointment by purchase from the king.[1]

Nor was the king subject to much restraint in legislative and kindred affairs. There was indeed an ill-defined body which, under the name of the Great Council, succeeded in some sort the witenagemot. Its members were enlisted from the archbishops, bishops, abbots, earls, barons, and knights. All of these were barons by tenure; even the clerics did not sit as *sapientes*, for baronial tenure had been forced upon them. All of them were tenants-in-chief, vassals holding land directly from the king and owing him allegiance. Among the barons there were differences of rank. Some were greater and some were less; some dealt in fiscal matters directly with the king, while some, among

[1] Stubbs, *Const. Hist.* § 122.

whom were most of the knights, paid their dues to the sheriff. The king called to council only those who would be of most service to him, usually those larger baronial landowners with whom his financial connection was closest.[1]

In general this Great Council was connected with just such business as was the witenagemot, but probably its influence was of a weaker sort in the Norman period. In legislation we find the statutes of William the Conqueror made by the king, "together with his chief men."[2] The ordinance of the same king separating the spiritual and temporal courts was made "by the common council and with the counsel of the archbishops and bishops and abbots and of all the chief men of the realm."[3] Henry I in his charter speaks of retaining the forests by the "common consent of his barons"[4] and of the laws of Edward which his father restored by the "counsel of his barons."[5] The fact of there being only nine witnesses to this docu-

[1] Stubbs, *Const. Hist.* §§ 123, 124.

[2] Stubbs, *Sel. Chart.* (8th ed.) 83.

[3] Ibid. 85.

[4] Charter of Henry I, c. 10, in Ibid. 100.

[5] Ibid. c. 13. Cf. R. Hoveden, *Chronica*, ii, 218.

ment suggests how slight was the influence of the council in this affair. The vagueness of the term "consilio baronum suorum" and the discrepancies between the pretended "council of the barons of the whole realm" and the small numbers of witnesses to the charters combine to arouse the suspicion that in the Norman period the influence of the Great Council was a theory rather than a fact, that the restraint which it placed upon the king was formal rather than efficient. "In private, perhaps," says Dr. Stubbs, "the sovereign listened to advice, but, so far as history goes, the counselors who took part in formal deliberations must have been unanimous or subservient. An assembly of courtiers holding their lands of the king, and brought together rather for pompous display than for political business, may seem scarcely entitled to the name of a national council. Such as it was, however, this court of bishops, abbots, earls, barons, and knights was the council by whose advice and consent the kings condescended to act, or to declare that they acted." [1]

What part did the Great Council have in taxation? The Conqueror retained the ordi-

[1] Stubbs, *Const. Hist.* § 123.

nary revenues of the English. To these he added the feudal imposts,[1] which, although not strictly taxes, may conveniently be touched upon here. A consideration of a few of the most important will be sufficient. First, there was the relief, the successor of the Anglo-Saxon heriot. In its earliest form the heriot was the return by the dead warrior of the arms his lord had given him or by the dead peasant of the stock similarly acquired; the appropriation by the lord of the serf's chattels, or perhaps the bequest of a testator to his lord as the price of the lord's warranty of his will.[2] The relief was an exaction which the feudal lord made of his vassal's heir before he would admit the latter as tenant. Such an ancient charge, in its source perhaps antedating the hereditary principle, was not readily to be shaken off when land came to pass from father to son. But while the heir might not free himself entirely from the burden of it, he would bitterly resent any arbitrary settlement of the amount by the lord. William Rufus exceeded what was deemed proper; he may indeed have often demanded the full value of the land and forced the heir

[1] Stubbs, *Const. Hist.* § 100.

[2] 1 Pollock & Maitland (2d ed.) 316, 317.

literally to buy it back.[1] The same king made of his right of consent to the marriage of daughters of tenants-in-chief a claim to receive money for that consent.[2] Another feudal incident was the right of the lord, as guardian of his vassal's infant heir, to enjoy the income of the land after maintaining his ward. This also William Rufus abused.[3] Amercements for offenses were arbitrary and might entail forfeiture of the tenant's property, without reference to the degree of the crime.[4]

Similar to wardship was the right of the king to hold the profits of vacant churches and turn them over to the new prelates. William kept the sees or abbeys vacant for long periods, gave the dependent monks only a bare subsistence, and appropriated the rest of the revenue.[5] Such arbitrary exactions of course fell heavily upon the whole landowning class, as the tenants-in-chief would seek to make themselves whole by similar demands from their own tenants. We have here another illustration of the centralization of authority in the king, of the approach to despotism. We can imagine that the nation

[1] *Charter of Henry I*, 2, in Stubbs, *Sel. Chart.* (8th ed.) 100. Note the contrast between "redimet" and "relevabit."

[2] Ibid. 3. [3] Ibid. 4. [4] Ibid. 8. [5] Ord. Vit. viii, 8.

grumbled, but we know of no decided constitutional protest. So strong were the kings that only in the days of their own seeking were they to be moved to buy support for their claims to the throne by charters promising reforms in these matters. That no very efficient part in gaining them can be assigned to a legislative council we have seen. On the other hand, as already suggested, they had importance as constructive admissions that the king was not absolute in his power; yet how nearly absolute he was may be judged from the promptness with which he forgot his promises as soon as he was firmly enthroned. It was in their grievances, however, that the landed men were to find their strength.

In the proper field of taxation we find the Danegeld, which had been abolished by Edward the Confessor, revived by William the Conqueror at the rate of six shillings on the hide, three times the ancient amount.[1] Corresponding to the Danegeld of the country, there was the *auxilium burgorum* of the boroughs.[2] The Domesday Survey of 1086 was made that the king might know the geldable

[1] Florence of Worcester, A. D. 1084; *Sax. Chron.* A. D. 1083.

[2] Stubbs, *Const. Hist.* § 126.

property of the nation, the number of hides or carucates, the number of plough oxen, the annual value of the land.[1] We have no evidence that in the levy of this tax any restraint was put upon the king by the Great Council. On the contrary, the words of the chroniclers suggest nothing but a purely royal exaction.[2] On the occasion of his accession Stephen promised to abandon unjust taxation and especially to give up for ever the Danegeld, "but he kept none of these oaths."[3] Taxation was apparently of the royal prerogative. Even if "it must be supposed that the king would lay before his barons any plan for increasing the existing burdens, and that such announcement would be regarded as necessary for the validity of the exaction, [yet] the silence of the counselors or their ready assent would be a matter of form."[4] If the king had deferred to the council we should not have such a mass of complaints of illegal taxation.

[1] Maitland, *D. B. and Beyond*, 4, 5.

[2] Henry I did indeed speak of "the aid which my barons gave me." 2 *Chronicon Monasterii de Abingdon*, 113. But the "giving," judging from the examples, was doubtless not voluntary.

[3] Henry of Huntingdon, lib. viii.

[4] Stubbs, *Const. Hist.* § 125.

Possibly the king allowed the members of his Great Council a larger influence in the course of general business, as in the election of bishops, the discussion of foreign and ecclesiastical policy, war and peace, royal marriages. On the whole, however, the council must have been so overshadowed by the king as to be but a faint forecast of the constitutional share of the people in the affairs of state.

The center of the financial and administrative machinery through which the king acted was the Court of Exchequer. From the time of Henry I this body consisted of the great officers of the household and state, of whom something has already been said, and of specially appointed justices or barons, the chief justiciar presiding. To this court the sheriffs must account for the income of the shires. This revenue consisted of four parts. (1) The "firma" or ferm of the shire was a composition for the ancient profits of the king, including the revenue of land belonging to the king, the early hospitality due to the crown in his progresses, court fines, and the like. These were computed at a fixed sum, which was the rent at which the county was farmed to the sheriff. The ferm he must pay annually, winning profits and

standing losses. Before accounting he paid the royal expenses for his county: regal benefactions to religious houses, the maintenance of the crown lands, the expenses of public business, and the cost of living and travel of the king and retinue while in the county. (2) The Danegeld and *auxilium burgorum* must also be accounted for. These too were compounded. (3) There were the proceeds of pleas of the crown, — the fines for offenses which had been taken from the ordinary jurisdiction of the shire and hundred, and were tried before the sheriff as justice of the crown. Examples of these pleas were found in the *murdrum*, or fine payable by the hundred in which a man was slain who was not proved to be an Englishman, in fines for non-attendance at the hundred or shire court, in breach of the forest law. (4) Lastly, the sheriff must account for the feudal income.[1]

The sheriff became the great administrative officer of the shire, no longer under the supervision of an ealdorman and subject to no control from his former adviser, the bishop. He was appointed by the king, although in a few cases the office became hereditary. In any event he

[1] Stubbs, *Const. Hist.* § 126.

was the officer of the king, to whom alone he was responsible. As executive in matters judicial, military, and financial in his shire, he did not find his ancient jurisdiction enlarged; he only possessed power more unrestricted in every direction except kingward.[1] Since we find fiscal administration entirely royal, we look for a similar centralization in judicature. William II administered justice for the profits. In this he did hardly more than any other Norman king. While Henry I may have believed that a nation in which justice is done is more prosperous and better-natured, hence more easily taxable, revenue was even with him a chief object.[2]

But centralization of justice in the king was slower than the similar process in legislation and state business, for the king met the old local courts, which, though theoretically under his officers, were not yet sufficiently close to the sovereign to be really royal. The king's immediate jurisdiction remained for a time extraordinary; it was for great causes and great men. The king could call causes into his own court, and did so when the litigants were rich and powerful enough to buy the royal writ. Pleas of the crown were mostly left for the sheriffs

[1] Stubbs, *Const. Hist.* §§ 98, 99. [2] Ibid. § 127.

to try. Sometimes the king sent a baron or prelate or a commission to preside over a cause in the shiremoot. Thus he drew the communal courts closer to himself.[1] When he sat personally, he was in earlier times surrounded by the witenagemot, or its successor the Great Council. Here he probably had his own way, although his counselors theoretically could, and often did, exercise the office of justice.[2] In this court of the Great Council were adjudged cases between tenants-in-chief and the king's personal causes. By the time of Henry I another court called the Curia Regis had become somewhat established. It was composed of almost identically the same members as the Court of Exchequer, hence was completely under the king's control. He personally presided when able; in his absence the chief justiciar represented him. This court considered causes in which the king's interest was concerned; such appeals as litigants were powerful enough to obtain; cases in which the powers of the lower courts were exhausted, or where they had failed to do justice; quarrels between tenants-in-chief who were too strong to submit to the shire and hundred courts. It had a rough

[1] Stubbs, *Const. Hist.* § 99. [2] Ibid. § 125.

sort of equity jurisdiction over cases in which the old courts were too antiquated to do justice; it had also some criminal jurisdiction. This court in time became the supreme court of all England. Henry I sometimes sent members of it to sit at the county court, as had the earlier commissions, and this practice, although not regular, did something to attract to the court of the king the local justice.[1]

The shire and hundred courts persisted in the Norman period, and, although made the means of exactions or other irregularities, were restored to the form of Edward the Confessor's time by Henry I.[2] As in Anglo-Saxon days, the shire court was attended by the lords of lands or their stewards, and by the reeve, priest, and four men of each town. It met twice a year under the presidency of the sheriff or his deputy, and the suitors were the judges. While its jurisdiction was criminal as well as civil, the king had taken a good part of the former (this process began in Anglo-Saxon times[3]), and

[1] Stubbs, *Const. Hist.* § 127; 1 Poll. & Mait. (2d ed.) 108–110.

[2] Order for the Holding of the Courts of the Hundred and the Shire, in Stubbs, *Sel. Chart.* (8th ed.) 103.

[3] Stubbs, *Const. Hist.* § 73.

now royal writ cut seriously into the latter. The regular court of the hundred, meeting twelve times a year, found most of its business in the jurisdiction of small debts. Twice a year it met for the view of frankpledge or sheriff's tourn, the inspection of the local police system.[1]

A few words about seigniorial justice must be said. The great lords who held the larger estates called manors had jurisdiction which varied with the conditions attached to their tenures. First, they usually had a court baron or hallmoot making by-laws and transacting the local business of the freeholders in the manors corresponding to the old townships. Second was the court customary in which was done the business of the villeins. Where the lord had a grant of sake and soke there was thirdly a court leet exercising a criminal jurisdiction cut out of or superseding that of the hundred, according to the size of the manor. Its suitors were exempt from attendance upon the criminal business of the hundred. If the lord had a grant of the view of frankpledge, his suitors were excused from the sheriff's tourn. In the great manors called honors, which were almost shires in themselves, the suitors were freed from

[1] Stubbs, *Const. Hist.* § 128.

attendance upon all the old popular courts. The procedure in the manorial courts, as well as the suitors, was the same as in the folkmoots; the newer courts were merely public jurisdictions in private hands. Being hereditary, the only ways for the crown to recover them were by forcing forfeiture (which was seldom resorted to) or by legal enactment placing them under central administration (which was to come in time).[1]

The picture presented in Norman times is of a nation under a king who is in fact a despot. In legislation, in administration, in taxation we see the sovereign acknowledging no other power except when forced to buy support. His throne once assured, he again assumes absolutism. Only in local jurisprudence is he subject to any check, and even though the suitors here give judgment, we see the king shaping the courts into a regal system by the pressure of his sheriffs and specially appointed judges. The manorial courts in the hands of the great landowners do indeed resist the realization of local royal justice, but this resistance is a threat to liberty rather than a step in its direction. Nowhere is there a healthy popular influence in

[1] Stubbs, *Const. Hist.* § 129.

government except at the bottom, where the freeholders still transact by ancestral German right their petty local business and sit in the judgment of peers. For the moment the barons are in eclipse. So far their enormous powers have been exerted by each man for his separate ends. The anarchy of Stephen's reign has resulted. But the time when they will find in the pressure of taxation a common cause is not far distant.

IV

JUDICIAL REFORMS. TRIAL BY JURY

The inherent tendency of the feudal system to the acquirement of power by the great feudatories has been noted. A second tendency, set in motion by the king, has been observed as correcting the first by centralization, but has not been followed to its end. That it was not wholly evil, although despotic, has been suggested, for the disruptive forces must be overcome if the nation was to be preserved. To accomplish this the popular strength was still inadequate, so the king must do it. The liberty of the nation would later be won more easily by an attack upon royal prerogative than by one upon scattered feudatories. Indeed, until the old-time provincial feeling of the people was changed by the very process of centralization into a full realization of national unity, the mighty blows for self-government could not be struck, or even desired. So in the completion of the second tendency we shall see the beginning of a third, not centrifugal like the first,

but one which will in the end substitute the popular will for the royal command as the expression of central authority. Nowhere do we find the two tendencies more nicely entangled than in the perfecting of the judicial organization during the last half of the twelfth century, a review of which will reward us with some definite evidence of the contributions of the landed man to civil liberty.

During the reign of Henry II the Curia Regis overshadowed the Exchequer. Whereas in Norman times the court proper had been the judicial phase of the Exchequer, the Exchequer now became rather the fiscal branch of the Curia Regis. Judicature, not financial administration, became the chief business of this body of the king's ministers. Furthermore the Curia Regis was brought into a closer touch with the local courts and obtained such control of them that it became the center of a related system which has in the main persisted to the present day.[1]

In the Curia Regis the king himself sat and personally did justice.[2] During the earlier days of Henry II it was probably, as in the

[1] Stubbs, *Const. Hist.* § 163.

[2] *Dialogus de Scaccario*, lib. i, c. iv.

time of Henry I, a tribunal of extraordinary jurisdiction, with a small but increasing number of appeals. In the course of time, however, the long absence of the king from the country, together with the rapid increase of resort to the court, required that the bulk of the work should be done without the king's presence, although still in his name. The number of justices grew with the increase of business to eighteen, but the court still lacked organization, and representations to Henry II of failures of justice led the king in 1178 to reduce the number to five, who were "to hear all the complaints of the kingdom and to do right, and not to depart from the Curia Regis." From this dates the Curia Regis "in Banco," later to become the King's Bench. In it the king did not sit except on especial occasions, although nominally all proceedings there were *coram rege*. Matters which this court could not untangle were to be referred to the king, who would decide them with the advice of the wise men of the kingdom. This reorganized Curia Regis had jurisdiction not only over cases in which the revenue or the rights of the king were concerned, but also over private litigation in which he had no interest except as supreme judge, indeed over all the

business of its later off-shoots, the King's Bench, Exchequer and Common Pleas. "It was no longer to be an extraordinary tribunal, a court for great men, for great causes, for matters that concerned the king; it was to become an ordinary tribunal for the whole realm." [1]

In this process of centralization we see the king becoming stronger as the judicial head of the nation; and yet his position had elements of weakness to royal prerogative but for which the cause of civil liberty would have suffered infinite damage from abuse of regal control of the machinery of justice. Fortunately the very assumption of judicial authority by the king so overwhelmed him that he was forced to delegate it more than ever. He even had to resort to the erection of a new court of very superior rank in which he did not sit. It is true that the judges were his appointees and answerable to him, but it has well been said that "whenever any number of men are collected and incorporated, possessing a known name, and invested with definite functions, they acquire independence, and may ultimately thwart or rival the power to which they owe their legal

[1] 1 Poll. & Mait. (2d ed.) 153; Stubbs, *Const. Hist.* § 163; Benedict, i, 207, in Stubbs, *Sel. Chart.* (8th ed.) 131.

existence." [1] So in this case the judges of the Curia Regis, without the presence of the king were placed where they would more and more be able to declare the pure law of England uninfluenced by royal will. Not that this wane of the king's impress upon judicature was rapid, nor that the danger of royal interference in justice passed within a few years or a century or two centuries, but that the way was opened for the gradual growth of judicial administration independent of royal caprice.[2] Nor was

[1] 1 Palgrave, *Eng. Com.* 274.

[2] Now and then the sovereigns did sit in the King's Bench. Edward I sat in certain Scotch cases. Burrow's *Reports*, 851. But perhaps this was in the exercise of jurisdiction resulting to him as feudal lord of Scotland, for we are told that in his time the king had lost the right to interfere in private causes. 4 Blackstone, *Commentaries*, 426. Even if the king sat in later times, he was no more than a dignified figure. "In this court the kings of this realm have sit in the high bench, and the judges of that court on the lower bench at his feet; but judicature only belongeth to the judges of that court, and in his presence they answer all motions." Coke, *Fourth Institute*, 73. At the time of Henry IV, at least, and doubtless earlier, it was law that none could render himself to the judgment of the king. The sovereign could not give justice in person even if the subject asked it. Coke, *Fourth Inst.* 71. Where the king's presence is no longer needed except as a form, he will not long remain. But though his actual presence passed, men invented a fiction. "The king is supposed in contemplation of law to be always present; but as that is in fact impossible, he is there represented by his judges, whose power

the delegation of judicial business the sole, or even the most influential cause of the final loss of royal prerogative. That it was one of the causes is sufficient for our present inquiry.

The reorganization of the Curia Regis must have been occasioned in part by the demand of the people for a better administration of justice. The Anglo-Saxon kings in their progresses had come in a large degree to oversee the Common Pleas,[1] and the people looked more and more to the king for justice. The Norman kings kept up the progress to some extent, but could not give it very close attention on account of their frequent and long absences upon the Continent. Now this body of Common Pleas constantly increased, and with it the king's justice came into greater demand. With the total of business increasing and the available royal

is only an emanation of the royal prerogative." 3 Bl. *Com.* 24. Even Blackstone's fiction is now negligible; it survives only in the name of the court and in the king's name on the writs; but these are only a shadow of antiquity, innocent bits of conservatism which have no substance. The day of prerogative is past. The court is the nation's, not the king's; but the king is the dignified element of the nation, its personification, so it does no harm to call the people's court the King's Bench. It should serve to remind the people that they have won their liberties from the king.

[1] Maine, *Early Law and Custom*, 187.

time diminished, it is easily imaginable that respectful pressure would be brought upon the king to relieve the situation by some process of delegation to his justices and by some organization of his court.

An illustration of the gravity of the situation may be found in the familiar story of Richard de Anesty.[1] Having a suit for the recovery of land which he claimed as heir, Anesty was forced during the years 1158 to 1163 to be in constant pursuit of Henry II. Three times he had to send messengers to the king, then in Normandy, for the royal writ; once he went himself for a similar purpose. Finally, when Henry returned to England, Anesty had to follow him pretty much all over the country before he got a hearing. Even then it was at the expense of a small douceur to the queen and of a handsome bribe to the king.[2] Meanwhile, for the support of his oath-helpers whom he had to carry with him, his traveling expenses, fees, bribes and all, he had to resort to usurious loans

[1] 2 Palgrave, *Eng. Com.* v, et seq.

[2] The story further illustrates the need and perhaps the cause for chapter 40 of *Magna Carta*, "Nulli vendemus . . . rectum aut justitiam," for even the admirable Henry II sold justice. So, too, did the venerated Edward the Confessor. 1 Palgrave, *Eng. Com.* 650.

from the Jews. Doubtless this incident was typical of many. Unquestionably those who suffered such grievances the most were the men of large landed interests whose causes, being the most important of the realm, were probably almost the sole ones carried to the king's court. It took wealth to press a suit in such a court, and landowners were almost the only wealthy men. Among the merchants only were there found men of much personal property, and they did not come much under the regular judicial administration, for in exchange for grants of taxes the boroughs early won independent exercise of jurisdiction in their own courts and according to their own customs.[1] Fortunately those who thus suffered the most were the barons who could vindicate their right to better justice.

That the landowners did not keep their grievances to themselves, but complained to the king seems reasonably certain. It appears that in 1178 Henry II made an investigation into the workings of justice and found that they were not as they should be. The result was the choosing of the new Curia Regis of five justices, "with the advice of the wise men of the kingdom."[2] The use of the council here, in

[1] Stubbs, *Const. Hist.* § 165; 1 Poll. & Mait. (2d ed.) 643.

[2] Benedict, i, 207, in Stubbs, *Sel. Chart.* (8th ed.) 131.

connection with the undoubted fact of the grievances, suggests that some very considerable influence in the reorganization of the court was exerted by the landowners. Less than forty years later the barons wrung from the king the provision that the Common Pleas should no longer, as they did meanwhile, follow the person of the king or justiciar,[1] but should be held at Westminster,[2] to the great cheapening and expedition of justice. Here then is one point where the landed man touched the judicial system and bettered it, thus aiding the cause of civil liberty.

More important than the delegation of the king's judicial authority or than the reorganization of his court was the manner in which this court reached down even further than in the Norman period and drew local judicature into a central system, thus causing most of the large increase which has been noted in the business of the Curia Regis. We must consider somewhat this process of amalgamation of the national and local justice. In it we find as the

[1] Although the king did not sit in the deliberations of the Curia Regis after 1178, the court did go where he or his justiciar (in the king's absence from the realm) went. The dependence of the court upon the person of the king was slowly lost sight of.

[2] *Magna Carta*, c. 17.

most important factors the introduction of itinerant justices and of trial by jury.

In connection with itinerant justices, we again find that royal judicature was at bottom fiscal. During the reign of Henry I, to recur to Norman times, we find that officers of the Exchequer were sent throughout the country to assess the revenue and see that all the lands bore their share of the taxes and imposts.[1] Now and then we hear of justices of the king holding a county court, but seemingly these are unusual cases, not instances of a regular practice.[2] Probably the system gained regularity upon the fiscal side before it did upon the judicial, and succeeded so well in the former respect that it was adopted in the latter. The principle, first invented as a means by which the king could secure his fiscal rights from the landed class, met one need so fully that it was extended to another and became a security of the rights of man against man and of the subject against the king. Itinerant justice, as a prompt and cheap means of obtaining right from the king, was an inestimable boon. Here again we find

[1] Stubbs, *Const. Hist.* § 126.

[2] See the cases of Ralph Basset, Stubbs, *Const. Hist.* § 127; and of Constable Henry of Essex, Ibid. § 137.

the landed man vitally connected with the development of a national judicature, which, at first royal, was to become in time divorced from prerogative and essentially popular.

But it was not only because the judicial iter was copied from and in early times made in conjunction with the fiscal iter, that the landed man influenced it; he had also something to do with the *occasion* of its adoption as a definite system. That occasion was the taking of the assizes. Until the introduction of these we have no record of anything like a system of judicial circuits. If we find one iter it seems unrelated to any other; it is not part of a scheme. But simultaneously with the assizes came the division of England into circuits, and the sending out of justices according to a definite system.[1] Then, so far as we can observe, itinerant justices first became what may properly be called an institution. Some connection this institution must therefore be inferred to have with the as-

[1] England seems first to have been divided into circuits by the Assize of Northampton. The assizes, being local inquests before the king's court, could be held only by judges sent out into the country. The largely increased business of the assizes, added to the hearing of presentments assigned to such judges by the Constitutions of Clarendon, demanded the organization of itinerant justice into circuits.

sizes; and the inference finds support in the provision of Magna Carta that itinerant justices shall be sent out four times a year to take the assizes of Novel Disseisin, Mort d'Ancestor and Darrein Presentment.[1] What we shall hereafter say of the influence of the landed man through the assize upon trial by jury will therefore help us to realize his share in the introduction of itinerant justices.

Another illustration of the increasing relation between the county courts and the Curia Regis is found in the events of 1170. Henry II returned from Normandy to be met by complaints of the oppressions of the sheriffs and bailiffs. Perhaps he would not so willingly have made any motion in the matter had he not been anxious to have his son Henry crowned. With a view to getting the consent of the barons to this unusual proceeding he was quite willing to yield to the demand for relief from the sheriffs, and in the Great Council he removed all the sheriffs and issued a commission for an inquiry into their acts by barons deputed to take oaths of all the barons, knights and freeholders of each county. Most important of all, he replaced the old sheriffs, who were mostly local

[1] *Mag. Cart.* c. 18.

magnates with an inclination to feudal administration of justice, by officers of the Exchequer. Thus we see another step in the process of concentration. That the complaints of the oppressed landowners had some influence upon the reform is clear; on this occasion the Great Council must have given a consent which was somewhat more than formal.[1] The sheriffs now began to lose judicial power, being pushed aside by the new itinerant justices. They had formerly not only presided in the county courts, but had also as justices held Pleas of the Crown. In 1166 the Assize of Clarendon shows them the equals of the itinerant justices, separately receiving the presentment of the grand jury.[2] Ten years later, in the Assize of Northampton, the itinerant justices held first place.[3] In 1194 sheriffs were forbidden to be justices, and elective coroners were provided to keep Pleas of the Crown.[4] Magna Carta completed the displacing of the sheriffs as justices by declaring that neither they nor the coroners nor other

[1] *Sel. Chart.* (8th ed.) 147; Benedict, i, 4, in Ibid. 130; Stubbs, *Const. Hist.* § 142.

[2] Assize of Clarendon, 1, in Stubbs, *Sel. Chart.* (8th ed.) 143.

[3] Stubbs, *Sel. Chart.* (8th ed.) 150.

[4] Form of Proceeding on the Judicial Visitation, cc. 20, 21, in Stubbs, *Sel. Chart.* (8th ed.) 259.

bailiffs of the king should hold Pleas of the Crown.[1] The itinerant justices were thus left as the presidents of the county courts, the firm bond between the local tribunals and the Curia Regis.[2]

We now come to the second great means by which the amalgamation of the courts was brought about, — the assizes. These, it will appear, were instituted largely through the influence of the landed man. Aside from the fact that they helped to draw local and national justice together, they have great interest because they developed into the jury system, an application of the ancient principle of judgment by peers to a court which, though in form royal, was made by the jury to preserve the traditions of popular justice. The right to trial by jury is a liberty of which Englishmen are justly proud, for it is peculiar to their constitution, and, more than that, the strongest guaranty of justice. Blackstone speaks of the jury as the "palladium" of liberties,[3] the "glory of the English law," the one thing which will save the freedom of Englishmen from the loss which befell Rome, Sparta, and Carthage.[4]

[1] *Mag. Cart.* c. 24. [2] Stubbs, *Const. Hist.* § 163.
[3] 4 Bl. *Com.* 350. [4] 3 Bl. *Com.* 379.

Trial by jury is not the *judicum parium* secured by Magna Carta;[1] it was not in use in 1215. The assizes, the only existent institutions analogous to trial by jury, were protected by separate clauses.[2] The phrase of Magna Carta refers to the general principle of German law which we have found in England expressed in the county and manorial courts. Attempts have been made to find the origin of the jury in Anglo-Saxon jurisprudence, but its distinguishing machinery is nowhere apparent there. We cannot connect it directly with the custom of popular suit at the local courts, for the suitors were judges of the law, not of the facts. Nor do we find its germ in Anglo-Saxon compurgation, for the compurgator pledged his faith to the credibility of the litigant whose statements were in issue, while the juror swore to facts of his own knowledge.[3] The twelve senior thegns in the shiremoot who accused criminals foreshadow the grand jury of presentment, not the trial jury.[4] The idea of popular justice underlying trial by jury was indeed Anglo-

[1] *Mag. Cart.* c. 39; 1 Palgrave, *Eng. Com.* 244.

[2] *Mag. Cart.* cc. 18, 19.

[3] 1 Palgrave, *Eng. Com.* 249; Stubbs, *Const. Hist.* § 164.

[4] Stubbs, *Const. Hist.* § 164.

Saxon and Germanic, but the machinery which applied the old principle in an entirely new form came to England with the Normans. This machinery was the inquest, long used among the Franks in fiscal business and adapted in England to judicial affairs.[1]

One of the earliest, if not the first, use of recognition by sworn inquest in England was in 1070 when William the Conqueror gave the people the laws of Edward the Confessor. The king wished to know what the laws were, and found out in the way that the Franks had of getting information. He had twelve "noble and wise Englishmen learned in the law" come before him from each county and on their oath declare what were their laws and customs.[2] But the great inquest of the Conqueror was fiscal, — the Domesday Survey of 1085. A rate-book being needed for the assessment of Danegeld, William obtained it in some such manner as he had discovered the laws. Commissioners were sent out with interrogatories upon which they took the sworn testimony of the men at

[1] 1 Poll. & Mait. (2d ed.) 140, 143; Thayer, *Preliminary Treatise on Evidence at the Common Law*, 47, 48.

[2] Roger de Hoveden, ii, 218, in Stubbs, *Sel. Chart.* (8th ed.) 81.

the shiremoot. The magnates of the shire spoke for the county at large. The men of each hundred stated the rating of each vill of the hundred, who held land, how much each held and "of" whom. The township also had its sworn representatives in the priest, the reeve, and six villeins.[1] Probably recognitions were confined largely to fiscal business such as assessment until the time of Henry II. We do, indeed, find a few cases of judicial inquests,[2] but such cases were special, not regular.[3] An examination of the instances collected by Palgrave[4] leads to the conclusion that there was no uniformity in the number of jurors summoned and little resemblance between the cases in the manner of procedure. The inquest was not yet established as a judicial institution.

The date of the emergence of the inquest, as a regular mode of justice and not a special favor, must be set at the year 1164, when the Constitutions of Clarendon were issued. While these constitutions pretend to be a recording

[1] Maitland, *D. B. and Beyond*, 10–12; 2 Palgrave, *Eng. Com.* ccccxliv; Stubbs, *Const. Hist.* § 126.

[2] Stubbs, *Const. Hist.* § 128.

[3] Thayer, *Prelim. Treat.* 51–53.

[4] 2 Palgrave, *Eng. Com.* clxxviii, et seq.

of ancient "customs and liberties and dignities," they contain the first statutory mention of recognition. More than that, it is the earliest document of any sort which refers to a judicial inquest as a definite procedure prescribed in a certain class of cases. A custom had doubtless been growing up to apply the inquest in such scattered judicial cases as the king saw fit to grant a writ for, but nowhere before do we hear of a writ which might be demanded of right. Here for the first time we see a fixed institution. Among the provisions of the constitutions we find this: In case of a dispute between clerk and layman as to whether a tenement was *eleemosina* or lay fee, it was to be determined by the recognition of twelve lawful men [1] in the presence of the justice of the king whether (*utrum*) the tenement was of one kind or the other. If found to be eleemosynary the plea was to be taken to the ecclesiastical court for adjudication, otherwise to the Curia Regis.[2] This *assize utrum* is a landmark in the advance

[1] The *probus et legalis homo* who served as recognitor was a freeman holding land. Blackstone defined him as the holder of free land of the value of 40*s.* per annum, qualified to serve on the jury and to vote for knights of the shire. 1 Bl. *Com.* 406, 407.

[2] Const. Clar. c. 9, in Stubbs, *Sel. Chart.* (8th ed.) 137.

toward concentration of local and national justice.

It was followed soon after by the assize of *novel disseisin*.[1] This provided that if a person were disseised, that is, dispossessed of his free tenement unjustly and without a judgment, he should have a royal writ, an assize (or "jury") should be impaneled, and if the plaintiff were declared by the recognitors to have been unjustly disseised, he was to be restored to possession. This was a revolutionary measure, one of the most important ever enacted in England. By it possession, as distinguished from ownership, was protected by an exceedingly rapid remedy. We will suppose that *A* and *B* both claimed title to the same land. In the decision of the dispute, according to the old method, the possessor would have the advantage, for he would be defendant and as such would merely have to swear that the land was his and get oath-helpers to swear that his oath was credible. As has been said by Professors Pollock and Maitland, not only did the burden of proof lie on the plaintiff, the benefit of the proof was enjoyed by the defendant. It there-

[1] Probably at the council at Clarendon in 1166. 1 Poll. & Mait. (2d ed.) 137, 145.

fore happened that if *A* was in possession, *B* might turn him out in order that he might get the benefit of being defendant. It was to avoid just such cases as this that the new assize gave *A* a speedy return to his normal advantage by means of an inquest of neighbors capable of declaring who had the right to possession. Of course the assize proved popular, and very soon brought into the king's court not only great men but humble persons of small holdings. The poorest man found protection from the danger of feudal justice, even against the king.[1]

Ten years later came a third assize, the *mort d'ancestor*. While the novel disseisin forbade a man, even though the rightful owner, to turn out the one in actual possession without judgment, the *mort d'ancestor* secured the possession to the heir of one who died seised of more than a life interest against even a person having a better title. The latter must secure his rights by an appeal to law; forcible seizure could not be allowed. If the claimant did take the land, the heir had his possessory action. While this assize, like the novel disseisin, was thus a declaration of the supremacy of law

[1] 2 Poll. & Mait. (2d ed.) 47; 1 Ibid. 137.

over force, it was also another blow at feudal justice made necessary by the fact that the man who seized the land was usually the dead tenant's landlord, who took this unlawful means of enforcing some pretended seignorial claims.[1]

A fourth "petty assize" instituted about the same time was that of *darrein presentment.* If a church were vacant and two persons quarreled as to the right of presentment, an inquest of neighbors was held to declare who presented the last parson. Such possessory judgment having been given, the last presenter could dispose of the advowson, and his opponent was left to his proprietary action, which must also be in the king's court, and in which the defendant could put himself upon the "grand assize." Here the royal justice absorbed not only the local and feudal, but also the ecclesiastical.[2] "It is probable that for a short while a few other cases were met in a similar fashion; but in a little time we have these four and only these four petty assizes." [3]

The "grand assize" of Henry II completes the list. While the petty assizes had to do only with the right to possession, this was resorted

[1] 1 Poll. & Mait. (2d ed.) 147, 148.

[2] Ibid. 148.

[3] Ibid. 149.

to as a means of determining title. If a proprietary action for land arose, the tenant or defendant could have a royal writ which gave him two important privileges. First, his case would be removed from the feudal court, where he would with difficulty get justice even if the plaintiff were not the lord. Second, he could escape the hateful trial by battle and have his case determined by an inquest of neighbors before the king's justice. Again the king's court cut into feudal jurisdiction.[1] Thus the first, and for some time the only clear, instances of judicial inquest which a party could claim as of right, related to suits of land or some thing growing out of land, for the advowson was a right connected with real property.

It must not be thought that the assize was precisely like our modern jury; the fact is that it was in some respects strikingly different. The recognitors were twelve men who knew the facts of the case and who were on their oath to declare which party was in the right. If in the panel any were found who did not know the "truth of the thing," they were rejected and others called until twelve men were found who were cognizant of the facts. If the jury

[1] 1 Poll. & Mait. (2d ed.) 147.

disagreed, talesmen were drawn until at least twelve were for one party.[1] Thus the jurors were witnesses, not judges of the facts upon the testimony of others.

Special writs for recognitions in cases other than the assizes are found running into the reign of Henry III,[2] but they are evidently expressive of royal favor rather than of regular procedure. The growth of the use of the jury in civil cases was rapidly extended, however, by consent of the parties, who recognized the many advantages of the system, and by the year 1275 it was the common law method of trial where no other was fixed.[3]

Jury trial in criminal law came about in a somewhat different way. The Assize of Clarendon provided that the royal justices and the sheriffs should have inquisition made in each county upon the oath of twelve lawful men of the hundred and four legal men of the town as to who were reputed guilty of murder, robbery, and larceny, and of receiving such criminals.[4] Here

[1] Glanvill, *Tractatus de Legibus et Consuetudinibus Angliae*, lib. ii, c. 17, in Stubbs, *Sel. Chart.* (8th ed.) 162.

[2] 2 Palgrave, *Eng. Com.* clxxviii, et seq.

[3] Thayer, *Prelim. Treat.* 59, 60.

[4] Assize of Clarendon, 1, in Stubbs, *Sel. Chart.* (8th ed.) 143.

we seem to have the successors of the twelve senior thegns of the hundred accusing criminals in the shiremoot, the development of the jury of accusers of the neighborhood ordered to be used in ecclesiastical courts by the Constitutions of Clarendon,[1] and the forerunner of our jury of presentment. If any were charged with crime, they were put to the ordeal of water.[2] But passing through the ordeal was not a full acquittal; it merely let the prisoner off with his life provided he left the kingdom within eight days.[3] This Assize of Clarendon thus did away with compurgation in criminal cases. When ordeal was abolished about 1218, in consequence of the decree of the Lateran Council of 1215,[4] the prisoner was then left with no appeal from the presentment of the assize. Trial by combat could be had only when there was a prosecutor to demand it, and such appeals were becoming less frequent. Hence the recognition was borrowed from the civil side of the law in order to meet the requirement for a trial of the facts in criminal cases.[5]

[1] Const. Clar. 6, in Stubbs, *Sel. Chart.* (8th ed.) 137.

[2] Assize of Clar. 2.

[3] Ibid. 14. The Assize of Northampton, c. 1, made similar provisions, applicable also to forgery and arson.

[4] Thayer, *Prelim. Treat.* 37.

[5] Ibid. 41; 1 Palgrave, *Eng. Com.* 266, 267.

The development of the jury, thus used in both criminal and civil cases, from a body of witnesses declaring the facts of their own knowledge to the modern jury judging the testimony of others, requires a few words. "As it became difficult to find juries personally well informed as to the point at issue, the jurors summoned were allowed first to add to their number persons who possessed the requisite knowledge, under the title of afforcement.[1] After this proceeding had been some time in use, the afforcing jurors were separated from the uninformed jurors and relieved them altogether from their character of witnesses. The verdict of the jury no longer represented their previous knowledge of the case, but the result of the evidence afforded by the witnesses of the fact; and they became accordingly judges of the fact, the law being declared by the presiding officer acting in the king's name."[2] Or in another way we may find the jurors becoming judges of the facts. In the case of novel disseisin, for example, the question in its simple form would be, Was the plaintiff seised? The assize could an-

[1] Cf. Glanvill, *De Leg. Ang.* lib. ii, c. 17, in Stubbs, *Sel. Chart.* (8th ed.) 162.

[2] Stubbs, *Const. Hist.* § 164.

swer Yes or No, and judgment would be given. But sometimes the defendant would plead some *exceptio*, some special plea alleging a reason why the question should not be put; and this grew more frequent as time went on. The justices also began to require the plaintiff to set out his case, and this fact and the special pleas often raised side issues which necessitated the conversion of the assize into a jury. The verdict of the twelve men which had been summoned, or perhaps of another twelve, was taken about the new question which had arisen from the pleadings.[1]

Thus trial by jury had its formal and definite origin in the assizes, and a very striking fact for us is that these assizes at the first had to do with land, and land only. Here we find the landed man in contact with an important movement which led immediately to the building up of the judicial system and ultimately to that cardinal feature of it, the highly prized jury.

The fact that an extension of the inquest took place in Normandy at about the time of the introduction of the assizes into England

[1] 2 Poll. & Mait. (2d ed.) 48. For a fuller treatment, see Ibid. 612–628.

has suggested the thought that Henry II may have evolved the reform in his unaided mind.[1] This, however, is hardly a necessary conclusion. Assuming Henry to have been (as he is always represented) an unusually wise legislator, he would hardly impose a new method of procedure where there was no need of it. Where there was need, there would be some sort of demand from those who felt the need. Glanvill spoke of "magna assisa, regale quoddam beneficium, clementia principis de consilio procerum populis indultum."[2] The writer was Henry's chief justice and spoke of his own knowledge. When he called the grand assize "a regal benefit, a favour granted by the clemency of the prince," what did he mean? In a certain sense everything coming from the king's hand was a favor. As the chief legislator of the nation, he bent to his subjects; but the grant of a favor could not be made by a sovereign ignorant of the needs of his beneficiaries. It can hardly be doubted that even in times of the strongest prerogative, the subjects found some respectful means of making those

[1] 1 Palgrave, *Eng. Com.* 243.

[2] Glanvill, *De Leg. Ang.* lib. ii, c. 7, in Stubbs, *Sel. Chart.* (8th ed.) 161.

needs known, so that the king did not always bend of his own motion. When the king had something to ask of the barons, he often granted favors which were not voluntary. The counsel of the barons, in theory always necessary to legislation, was thus in practice sometimes more than mere advice. Glanvill's words are modified by the usual phrase, "with the consent of the nobles." Whether this consent was merely formal, or whether it was advice of an urgent nature, we may unfortunately not know, as the circumstances attending the granting of the grand assize have never been ascertained. We may, however, with some safety guess that it was not the former.

Of the conditions attending the introduction of the *assize utrum* we know considerable. The preamble of the Constitutions of Clarendon shows that they grew out of disputes between the clergy upon the one hand and the king's justices and the barons of the realm upon the other.[1] The bone of contention was the juris-

[1] "Propter dissensiones et discordias quae emerserant inter clerum et Justitias domini regis et barones regni de consuetudinibus et dignitatibus, facta est ista recognitio coram archiepiscopis et episcopis et clero et comitibus et baronibus et proceribus regni." Stubbs, *Sel. Chart.* (8th ed.) 137.

diction of the temporal courts over clerics. The result, so far as we are presently concerned, was the *assize utrum* by which certain causes as to land between the clergy and the laity were to be settled by the oath of twelve lawful men.[1] The preamble further tells us that the council made an inquest of the customs and liberties of the times of Henry I, and that the Constitutions are a partial recital of the same, but it has already been noted that we cannot trace the use of an assize as an established and prescribed mode of procedure beyond these very Constitutions. In view of this fact and of the quarrel which led to the council, is it not practically certain that we find here a sort of treaty of peace which gave the barons a right which, while not without various disconnected precedents, yet as an absolute right was novel? The barons may well be believed to have forced this result in protection of their landed interests.

In the absence of any knowledge as to the exact date of the *grand assize*, we may not know whether that great boon was copied after the *assize utrum*, but the latter may perhaps be the earlier and the pattern. The *darrein pre-*

[1] Cap. 9.

sentment was undoubtedly of later origin. The Constitutions of Clarendon do indeed provide that questions as to advowsons shall be decided in the king's court,[1] but the absence of any reference to an assize makes it probable that such process was not used in this connection until later.[2] The two remaining assizes, *novel disseisin* (1166) and *mort d'ancestor* (1176), were obviously of later growth and were very likely based largely upon the analogy of the *assize utrum*.

We may make ample allowance for the influence of the constructive legal mind which Henry undoubtedly possessed and still have room for the influence of the landed man upon the assizes. Probably all were issued in council. That this was true of the *grand* and *utrum* we have already seen. As to *darrein presentment* we have no knowledge. *Novel disseisin* is assigned by Pollock and Maitland to the council of Clarendon in 1166,[3] and *mort d'ancestor* is generally supposed to have had its

[1] Const. of Clar. 1, in Stubbs, *Sel. Chart.* (8th ed.) 137.

[2] Compare 1 Poll. & Mait. (2d ed.) 148, showing that real occasion for a possessory action in advowsons did not arise until 1179.

[3] 1 Poll. & Mait. (2d ed.) 145.

origin in the fourth clause of the Assize of Northampton. That the barons present in all these councils would not be satisfied with mere perfunctory consent to measures of such value to them as landowners seems certain. Such reforms would scarcely be imposed upon unwilling advisers; on the other hand, the barons would the rather ask for them. What their temper in the matter was may be illustrated by their demand forty or fifty years later for the protection of the assizes.[1] That, on the other hand, they were wrung from an unwilling monarch there is no warrant for assuming. Undoubtedly Henry was very ready to use this method of strengthening the royal justice. Just the proportion which the two influences bore to each other will never be ascertained. It is sufficient for our present inquiry that we have clear evidence that the landed man has here left his impress upon civil liberty.

If we were to sum up the chief elements which joined to build up this central system of judicature reaching down to the local by means of itinerant justices and the embryonic jury, we should find them three in number. First, there

[1] *Mag. Cart.* cc. 18, 19.

was the need of the king by commissions and inquests to see that the landed man, in matters of taxation, was doing right to the sovereign. Second, there was the need of the landed man for a better means of securing his property rights against his neighbor and the king, a need which found expression in demand for relief. Third, there was willingness on the part of the king to grant reform (1) because of the need he had of the financial support of the landed man, (2) because of his desire to overcome the remnants of justice in the hands of the old Norman feudatories who were now passing. In every one of these elements we find the landed man a factor of importance. Thus at every point of the marvelous development of national justice which not only secured right to Englishmen, but which also was of uncountable value in unifying the people and preparing them for self-government, the landed man left his impress.

V

THE STRUGGLE FOR MAGNA CARTA

THE progress of liberty seems ever inseparable from the subject of taxation. Just now we have traced the fiscal origin of one of our free institutions, and on several occasions we have seen the subject winning concessions from the sovereign in return for financial support or personal service. Frequently liberty was won by bargaining with the king. In increasing number we find the boroughs and cities getting local government in consideration of grants of taxes. But the establishment of freedom-giving institutions in order that the king might reach all taxable property, and the peaceful method of purchase, were not the only modes of advance. The time came when these could not prevail with sufficient speed against a tyrannous king, and armed hostility became the expression of resistance to fiscal burdens and the efficient means of advancing the liberties of the nation.

The Great Council during the days of Henry II grew in prominence; perhaps its power increased slightly withal; but as a practical check upon the king, it exerted little of the influence of a truly legislative body. When it opposed itself to the prerogative, it was rather as a loose body of landholders who must be propitiated than as a legislature with any initiative, or even as an advisory council with any *esprit de corps*. For all this, the Great Council contained the germ of a legislative body, since formal consent is not infinitely distant from timid demand, which is in turn but a longish step removed from initiative. The barons may not very early have found it out, but their individual interests in taxation were really common. When they realized this fact more fully, they would be readier to take the steps, but it must at first be slowly, feeling the way like blind men. Meanwhile the influence of the council would be, not unimportant, but unorganized.

Henry II gave his Great Council many opportunities to share in legislation. Even though the share were formal, this of itself would tend to give the body standing. During the king's presence in England, councils were frequent,

and many an important enactment was published in them. Very hopeful indeed were certain traces of a growing deliberation, indicating that the opinions of the counselors were listened to even if not acted upon by the king. Henry talked over the condition of the realm with his council in 1154;[1] he called together the bishops in 1163 to discuss the criminous clerks, and the talk was protracted pretty persistently into the evening;[2] in 1184 he asked for and followed the advice of the bishops in an ecclesiastical matter;[3] similarly he assembled the Great Council at London in 1176 and sought and received their counsel.[4] But how little after all was the real power of the council against a king who insisted on his own way may be seen from reference to the Great Council at Nottingham of 1194. The chronicler graces this with the name of "colloquium," which surely indicates deliberation, yet how supreme was the king's will is shown by the acts of the four days' session. Richard I deposed some sheriffs and sold their offices; he demanded judgment

[1] Gervas, c. 1377, in Stubbs, *Sel. Chart.* (8th ed.) 128.

[2] Gervas, c. 1384, in Ibid. 129.

[3] Benedict, i, 311, in Stubbs, *Sel. Chart.* (8th ed.) 133.

[4] Benedict, i, 116, in Ibid. 130.

against John, and the council summoned him to answer; he determined (*constituit*) that 2*s.* be given him from each carucate in England; he took (*praecepit*) a scutage; he exacted (*exegit*) the wool of the Cistercian monks; he heard charges of treason.[1]

On one occasion the council stepped out of bounds. Longchamp, the justiciar of Richard I, fell into disfavor with the bishops and barons because of his exactions. A Great Council, which could legally be summoned only by the king or justiciar, was assembled by John, Longchamp was deposed, and the Archbishop of Rouen was elected justiciar. While even a council properly summoned had no right to depose or appoint a royal officer, the offense was the less because the new justiciar presented to the council an appointment by Richard. This incident must be viewed as entirely exceptional and not as representing any permanent advance in the power of the Great Council. It is valuable, however, as showing that the barons had begun faintly to feel that they had a claim to a larger share in government.[2]

[1] Roger de Hoveden, iii, 240, in Stubbs, *Sel. Chart.* (8th ed.) 253.

[2] Stubbs, *Const. Hist.* § 149.

Perhaps the most hopeful signs of the times were the first instances of open resistance to the king in council. At a council at Woodstock in 1163 Henry II proposed to add to the royal revenue the 2*s.* which every hide of land annually paid to the sheriff for his administrative services. Becket declared in the face of the king that it would not be given as royal revenue, although the sheriff should not lack for it. Henry answered angrily, but the archbishop again insisted that, as for the church, it should not be done. No very important result issued from this other than the quarrel between Henry and Becket, but it is interesting as the first reported case of opposition to the king's will in taxation.[1]

Again in 1198 we meet with a similar case at the Great Council convened by the justiciar, Archbishop Hubert. The occasion was a demand for an unprecedented scutage for the war in Normandy. The Bishops of Lincoln and Salisbury flatly refused to pay the tax upon their lands, and the justiciar was so overwhelmed with resistance that he withdrew

[1] Stubbs, *Sel. Chart.* (8th ed.) 129; Stubbs, *Const. Hist.* § 139.

his demand and resigned his office.[1] It is significant that the first two instances of constitutional opposition to royal will were connected with land taxes and that the second, at least, was entirely successful.

Hopeful as was this firm opposition to taxation, it was undoubtedly made because the objectors were personally unwilling to pay, not because as advisers they deemed the taxes unwise, much less because as legislators they were caring for the interests of others whom they represented. So too, although objection indicates deliberation, we must not think that the Great Council was yet able to arrive at a conclusion and declare it with any authority. The authority was still the king's; the only thing for the council to do was to agree with the royal will or else block it by individual refusals of the greater landowners to submit to a tax. In judicial reforms, the demand of the landowners not running contrary to the royal will, influence by advice, as we have seen, was possible. In matters of taxation, however, the minds of king and baron could rarely be the same. It is some

[1] Roger de Hoveden, iv, 40, and Vita Magna S. Hugonis, 248, in Stubbs, *Sel. Chart.* (8th ed.) 255; Stubbs, *Const. Hist.* § 150.

indication of how much the sovereign had his own way that, in spite of the steadily increasing fiscal burdens, there are on record only two cases of opposition to taxation in the Great Council.

It will be well for us to see how great was the cause for the barons to take an interest in the granting of taxes and to oppose the king when they dared, for, as has already been more than once said, it was in their fiscal grievances that the landowners found their strength. Indirect taxation, such as customs, had not yet become important. The general taxation of the country was direct, and its early incidence, like that of feudal imposts, was upon the land. Personal property was first made to contribute to the support of the nation in 1181, when the Assize of Arms required the possessor of chattels or an income of certain values to have corresponding military equipments. Thus those who did not owe knight service were enrolled in the militia, and the old *fyrd*, or host of the people in arms, was revived.[1]

The first real personal property tax was the Saladin Tithe of 1188, a levy of one tenth of the annual value of movables and rents for use

[1] Stubbs, *Sel. Chart.* (8th ed.) 153.

in the Crusade.[1] At several other times before Magna Carta similar taxes were gathered: a fourth for Richard's ransom in 1193;[2] a fortieth for the Crusade in 1201;[3] a seventh from the barons in 1203, exacted for not serving John in Normandy;[4] in 1207, a thirteenth from the whole country. In the last instance, the king had some difficulty. At a first council at London, he proposed to levy upon the clergy, but met with opposition, and had to delay until a later council at Oxford, where the same demand received such resistance from the Archbishops of Canterbury and York that the king decided to distribute the burden of the tax among all the holders of personal property, lay and cleric.[5] The Archbishop of York paid for his little denial of prerogative by being obliged to leave the country. Here we have another illustration of the fact that opposition to taxation in council was personal, for the clergy lightened their burdens only by forcing the king to shift a portion of them to other

[1] Stubbs, *Sel. Chart.* (8th ed.) 159.

[2] Roger de Hoveden, iii, 210, in Ibid. 252.

[3] Stubbs, *Const. Hist.* § 151.

[4] Matthew Paris, 209, in *Sel. Chart.* 272.

[5] Annals of Waverley, 258, and Matthew Paris, 221, in Ibid. 273.

taxpayers, some of whom were not so well able to resist it. That the necessity of consent to taxation was not recognized is shown by the fate of the archbishop. The personal property taxes before Magna Carta were few and were taken only upon special occasions, and cannot be said to have been established as part of the regular fiscal system. But the very fact of their newness and irregularity early caused opposition to them and added to the grievances which were accumulating to force the people to make stern demands upon the king. Meanwhile the burden of land taxes of unprecedented severity was working in an even greater measure to the same end.

The hated Danegeld was abolished in 1163, only to be revived under the different name of carucage, levied upon new units of land of one hundred acres each, called carucates, instead of upon the old hide.[1] This tax affected all landowners, except those upon demense lands of the crown and in the towns, where tallage was collected upon the land, and possibly upon other property. The carucage, originally two shillings upon a carucate, as in

[1] Variously estimated at thirty and one hundred and twenty acres.

the case of Danegeld, was raised by Richard I in 1198 to five shillings and by John fixed at three.[1]

The primary feudal incident was military service. At an early date in the Norman period, it began to be established that the feudal tenant of land of the annual value of perhaps twenty pounds (which was called a knight's fee) was to be liable to furnish a fully armed horseman to serve at his own expense for forty days in the year.[2] Almost all the tenants-in-chief of the king held by this military service. The great baron would be answerable for a number of knights, varying with his estate, but generally some multiple of five, and rarely perhaps exceeding sixty.[3] The tenant-in-chief who held by the service of fifty knights was bound to appear in person with forty-nine other knights. If he was disabled, he might send a substitute for himself, as could also women and ecclesiastics. The baron, whom we will call *A*, might hire these other knights, or he might have enfeoffed with his land forty-nine sub-tenants, each of whom held by the service of one knight and must follow in person. Pos-

[1] Stubbs, *Const. Hist.* § 161.

[2] Ibid. §§ 96, 133.

[3] 1 Poll. & Mait. (2d ed.) 254–259.

sibly he had enfeoffed a larger number, who thus owed fractional service.

Take for illustration the simpler case where *B* held a particular portion of land of *A* by the service of one knight. The duty of military service *B* owed to the mesne lord *A*, and to him alone; he had no tenurial duty to the king. To be sure the king required his oath of fealty, but that was personal, not tenurial. Yet the king had a practical hold upon *B* because every part of *A*'s land, including *B*'s tenement, was liable for *A*'s service to the king. Hence if *A* did not furnish his fifty knights the king could distrain *B*'s tenement for the whole fifty. In that event, however, *A* must acquit *B* for the surplus service. The primary duty to the king was *A*'s; *B* was bound by tenure only to *A*. But *B* was liable to serve *A* only in the king's army, and need not follow in the baron's private quarrel, which shows how the English system had departed from pure feudalism. Yet the fact remained that *A* was the one to whom the king must look for the military support of fifty knights, whom *A*, not the king, summoned, and who went to battle under *A*'s banner.[1]

[1] 1 Poll. & Mait. (2d ed.) 260–264.

Under such a system, the position of the baron was one of importance. His tenants might indeed, in the last analysis, bear the burden of military service, but it was to him that the king must look for the collection and organization of a considerable band of fighters. Because of the value of his support, he was of all subjects the best qualified to resist excessive demands of the king. But the smaller the holding of the baron, the less his importance to the king and the less potentiality of resistance to royal will. Possibly this accounts for the fact that the smaller tenants-in-chief, although bound to the king by the same personal and tenurial relations as were the greater, were not called upon by the king to give a formal consent to his acts in the Great Council.

The difficulties of getting together so ill-organized a force proved a bar to its efficiency and turned military service into a system of land taxation. Even before the time of Henry II, sub-infeudation had brought about a condition where tenants of the mesne lord held fractional parts of knight's fees. This meant that in some cases, for example, three tenants must furnish two knights or many tenants must furnish one.

These tenants would naturally come in time to discharge their liability by a cash payment to the lord. The king also found it more convenient to depend upon a mercenary army than upon the rather unknown quantity of a body of knights answerable for only a brief service, hence we find Henry II in 1159 commuting the personal attendance of the tenants-in-chief and their followers for a money consideration, or scutage, of two marks for each knight.[1]

Yet tenants-in-chief did not seemingly have the right to choose between actual service and the payment of a fixed scutage. Theoretically they must serve, and if they failed to do so must pay the king a fine as the purchase of pardon, and this fine might be arbitrarily fixed after the fact at a higher rate than the established scutage. As a royal favor the baron might at times get a writ *de scutagio habendo*, ordering the sheriff to collect the scutage from the tenants for the king's use, or perhaps now and then a similar writ would allow the baron to collect from his tenants the fine he had paid. The sub-tenants seem to have been the only ones aside from the king to get any immediate benefit from the introduction of scutage, for they apparently were

[1] 1 Poll. & Mait. (2d ed.) 267.

very early able to claim the right to pay the established rate of scutage instead of serving. The presence of so many fractional fees among them was a chief cause of this. If they had in the old days refused service, the lord could have declared their tenements forfeited, but with the decline of the feudal courts this passed, and the king's court afforded the lord no such remedy. Thus the claim of the sub-tenant to the right to pay instead of serving was protected, and his military duty became a liability merely to pay the fixed tax represented by scutage. This tax was anti-feudal; it was royal and national. The sheriff usually collected it for the immediate use of the crown. Indeed the grants of scutage by the barons in the time of Henry III were often merely permissions to collect from the under-tenants dues which upon feudal principles belonged to the lords.[1] But we have been anticipating a bit and speaking of developments which really belong to the thirteenth century. What at present interests us is that from 1159 on we frequently find a land-charge called scutage and in John's reign see centering about it and the related duty of service a struggle for liberty.

In its earlier history scutage was the charge

[1] 1 Poll. & Mait. (2d ed.) 267–274.

collected directly from the tenants-in-chief in lieu of military service. Although its incidence might ultimately be upon the under-tenants, it fell in the first instance upon the tenants-in-chief, and of these the greater barons, as the larger taxpayers, held somewhat the same position of importance as they had held when furnishing the largest fighting forces. About them as leaders would naturally center any disaffection which abuse of the new land tax might arouse.

Inasmuch as scutage was a substitute for military service due and not given, it was in origin a feudal impost which the king could claim without even the formal grant of the Great Council, which was in theory necessary in case of an extraordinary tax. Thus that of 1159 was simply "taken." [1] In 1198, however, Richard I wished for a variation of the usual levy, and demanded either three hundred knights for a year's service or their equivalent in money. The request being extraordinary, since not based

[1] "Sumptis lx. solidis," Rob. de Monte, in Stubbs, *Sel. Chart.* (8th ed.) 129. Cf. *Dial de Scac.* lib. i, ix. "It happens sometimes that, when the machinations of enemies threaten or attack the kingdom, the king *decrees* that, from the different knight's fees, a certain sum shall be paid, to wit, a mark or a pound."

upon the usual feudal due of service for forty days, the Archbishop of Canterbury evidently thought it best to obtain the formal consent of the Great Council. Therefore he called that body together at Oxford, and presented the case, doubtless with the expectation that it would meet with the usual subservient approval of the barons. How much reason he had for the expectation is shown by the story of the chronicler, for "while all the rest were disposed to do this, not daring to resist the will of the king, Bishop Hugh of Lincoln alone, a true respecter of God, refraining from every base work, answered for himself that he would not yield a jot to this will of the king, both because in the process of time it would redound to the detriment of his church, and because his successors would say, 'Our fathers have eaten a sour grape and the children's teeth are set on edge.'"[1] The bishop declared that the lands of his church of Lincoln were liable for military service in England alone; without its bounds her knights would not go. Upon this the Bishop of Salisbury gained the courage to side with the Bishop of Lincoln, and the council was dismissed by the

[1] Roger de Hoveden, iv, 40, in Stubbs, *Sel. Chart.* (8th ed.) 255.

incensed justiciar.[1] This second instance of opposition to taxation in council is here related a second time because of its relation to the controversy about scutage and military service, which from now on kept recurring and finally culminated in Magna Carta.

The barons had suffered the oppressions of Richard in almost unbroken silence, but were not inclined to allow their patience much longer to be taxed. Of John's turbulent nature they had indications enough during Richard's life, so in the interregnum after the latter's death there was considerable uneasiness. The situation was more like that attendant upon the accessions of the Norman kings than upon those of Henry II and Richard. John did not come to the throne with nothing to ask of the people; he was distrusted, and must secure support. Archbishop Hubert allayed the fears of the barons by promises on behalf of John of redress of every grievance, promises which were emphasized at the time of the coronation.[2]

John immediately entered upon his course of broken faith by levying in the very first year of his reign a scutage of three marks on account

[1] Vita Magna S. Hugonis, 248, in Stubbs, *Sel. Chart.* (8th ed.) 255.

[2] Stubbs, *Const. Hist.* § 151.

of the war in Normandy and a carucage of three shillings, both in excess of the usual rate.[1] It is little wonder that when the king in 1201 ordered the barons to meet him at Portsmouth prepared to cross to France, they took private counsel together and demanded the reforms which he had promised as a condition of service. The remonstrance only added to their grievances, however, for the angered king seized their castles.[2] To make matters worse, when the barons did finally assemble according to command, John gave up the expedition, and, taking from some of them the money which they had brought for support in his service, sent them back home.[3] Then in two years came the exaction of a seventh of the movables of the barons for pretended breach of duty to serve and desertion from the king, who, having got them into Normandy, had shown an unwillingness to fight, which sent them home disgusted.[4] In 1204, however, the barons were still sufficiently afraid of the king to grant him a scutage of two marks

[1] R. Coggeshale, in Stubbs, *Sel. Chart.* (8th ed.) 272.

[2] Roger de Hoveden, iv, 160, 161, in Stubbs, *Sel. Chart.* (8th ed.) 272.

[3] Roger de Hoveden, iv, 163, in Ibid.

[4] Matthew Paris, 209, in Ibid.

and a half.[1] The next year they did attempt a stand for their rights. At a Great Council at Oxford they approved of a reorganization of the army by which every nine knights were to join to equip a tenth with wages of two shillings a day for the country's defense. Oaths of fealty were required of the whole nation. In return John was himself obliged to swear to observe the rights of the kingdom.[2] If the barons thought they had won a victory, they were grievously deceived, for John immediately assembled an army at Portsmouth under pretense of crossing the Channel, embarked and made motion to sail, then played his old trick of abandoning the enterprise because of the unwillingness of the barons to follow him, and took their money from them.[3]

The patience of the barons was, however, capable of further trial before their spirits would rise to the point of revolt, and it was not until the events of the year 1213 that the weight of military service and taxation upon the landed men finally induced them to act. John proposed an expedition to France. The barons demurred

[1] Matt. Paris, 209, in Stubbs, *Sel. Chart.* (8th ed.) 272.

[2] Stubbs, *Const. Hist.* § 154.

[3] Matt. Paris, 212, in Stubbs, *Sel. Chart.* (8th ed.) 273.

on the ground that he was still excommunicate. After the absolution of the king which soon followed, this plea lost its force, and when the king renewed his proposal, other excuses had to be advanced. The northern barons, following the example of Hugh of Lincoln in 1198, asserted that they were not bound by their tenure to foreign service. This was too much for John's temper, and he gathered his immediate forces and started northward; but his ardor cooled with usual rapidity, and the march was suddenly reversed.

On August 4, 1213, came the assembly called by the justiciar, Geoffrey Fitz-Peter, to meet at S. Alban's to inquire concerning the value of the lands for which the church demanded restitution of the king. This assembly was attended not only by the bishops and barons, but by representatives of the township. Thus for the first time in an English national meeting the small landowners found a place. The council departed somewhat from the business for which it was summoned. The justiciar laid before it the promise of good government which the king had just made on his absolution and which was already broken. He also issued an edict forbidding illegal exactions and referred to the laws

of Henry I as the basis for reforms. At another council at S. Paul's, on the 25th of August, attended only by clerics and barons, the charter of Henry I was produced and made the basis of claims which the justiciar laid before the king, but the immediate death of Geoffrey and the king's absence abroad during most of the year 1214 postponed for a time a settlement of the differences.

Upon his return in October, 1214, John thought immediately to have an accounting with the northern barons, but they were too prompt for him. They took solemn oath with each other to withdraw their allegiance if the king did not give them immediate security for their liberties by a charter under his seal, and to enforce their demands agreed to raise an armed force. John attempted to make a division of his opponents by promising to the clergy freedom of election, the denial of which had led to his quarrel with the church, the interdict of the realm, and his excommunication. But the bishops had made common cause with the lay barons and were not to be diverted. In January, 1215, John heard the demands of the barons, and, playing for time, secured a truce until after Easter. Meanwhile he again issued a charter

of freedom to the church, directed an oath of fealty to be taken throughout England, and demanded renewed homage from the tenants-in-chief. He even took the vow of Crusade in order to make an attack upon him sacrilege. But his efforts were in vain. The barons assembled their army at Stamford, and as soon as the truce was ended marched to Brackley. John, fifteen miles away at Oxford, was duly alarmed. He sent a deputation to ask their conditions, which were dispatched to the king with the threat that, if they were not granted, open war would follow. John angrily refused peace upon such terms, although at about this time he did offer the barons a promise that neither he nor his men would go upon them or their men but by the judgment of their peers or the law of the land.[1] The barons had a larger principle at stake, however, and happily declined to be pacified, for only a few weeks later they wrung from the king the same promise as to all freemen,[2] besides many other concessions. The baronial army no longer delayed. Marching to London, they completed their successful show of force by winning to their side the remnants of the king's

[1] Blackstone, *Introduction to the Charters*, xiii, note x.

[2] *Mag. Cart.* c. 39.

supporters. John yielded perforce and executed the Great Charter of liberties on June 15, at Runnymede.[1]

Magna Carta was therefore in its inception a protest of the landed man against the imposition of burdens upon his land. Even had we not the detailed account of the events which led to the charter, the document itself bears convincing internal evidence of the part which the owners of land played in securing it. No less than sixteen[2] of the sixty-three clauses relate directly to the limiting of feudal obligations. Three[3] refer to amercements with which John had oppressed his people, and save to the amerced certain rights in land. Seven[4] put a check upon the king and his officers in the execution upon the land of purveyance, tax debts to the crown, bridge taxes, and ferms. Two[5] regulate the payment of debts to the Jews and other creditors from the real estate of deceased men, saving the rights of the lord in the tenement, the dower of the widow, and the support of the chil-

[1] Stubbs, *Const. Hist.* § 154; Blackstone, *Int. to Chart.* ix, et seq.

[2] Clauses 2–8, 12, 15, 16, 29, 32, 37, 43, 46, 53.

[3] Clauses 20–22.

[4] Clauses 9, 23, 25, 26, 28, 30, 31.

[5] Clauses 10, 11.

dren. Three[1] protect landowners from disseisin by the king without the verdict of their peers. Most important of all, two clauses[2] secure the right of the tenants-in-chief to consent to taxation. No scutage or aid was to be imposed in the kingdom unless *per commune concilium regni*, except in case of the three primary feudal aids for ransom of the king's person, making his eldest son knight, and once marrying his eldest daughter; and even these were to be reasonable. The common counsel was to be given, in the cases not excepted, by an assembly to be called by the king; the archbishops, earls, and greater barons to be summoned by writs directed to each severally, all other tenants-in-chief by general writs addressed to the sheriff of each county; the writs to fix a place for meeting and a time not less than forty days distant, the purpose of the council to be set forth; the consent of those present to bind those who did not attend. Here the "common consent of the realm" was effectively recognized; henceforth the principle, although not yet perfect and often temporarily ignored, was thoroughly rooted in the constitution.

[1] Clauses 52, 56, 57. [2] Clauses 12, 14.

Of the many clauses relating to the administration of justice, a few deserve our special consideration, both for their intrinsic importance as safeguards of liberty and for the relation which the landed man bore to them. The influence of the landed man in the divorcement of justice from the person of the king has already been touched upon. In Magna Carta we see it illustrated in the separation of the Court of Common Pleas from the king's immediate court and its establishment in one certain place.[1] The barons also saw to it that the assizes of novel disseisin, mort d'ancestor, and darrein presentment should be taken in the counties where the cases arose. Two justices were to go into each county four times a year and, with four knights chosen by the county, hold these assizes in connection with the county court.[2]

Justices, constables, sheriffs, and bailiffs the king was to choose only from such as knew the laws of the land and had a will to observe them.[3] Here was the entering wedge of popular control of judicial officers. It would be long before it would become efficient, but already the barons recognized that their liberties depended much upon learned and conscientious judges.

[1] *Mag. Cart.* c. 17. [2] Ibid. cc. 18, 19. [3] Ibid. c. 45.

No thought had yet appeared of taking from the king any of his right to create or abolish courts and to appoint or remove justices, but it was required of him by the barons that he use good faith in appointment. Further to secure just judgment, sheriffs, constables, and coroners were not to hold Pleas of the Crown; [1] those cases were reserved for justices better qualified than they.

The answerability of the king to the people in the exercise of his judicial prerogative found stirring phraseology in two of the capital clauses of Magna Carta. "To none will we sell, to none will we deny or delay right or justice." [2] Justice must be free and prompt. It had not been so at all times in the past; it would not be so at many times in the future; but here was a cardinal right enunciated by the barons in behalf of themselves and of all the people, and admitted with the utmost clearness and formality by the king. It was not the statement of a new right indeed, but a covenant regarding an old one to which every man could point and say, "Here is my guaranty of justice." Then there was that other assurance of the preceding clause: "No freeman shall be taken or

[1] *Mag. Cart.* c. 24. [2] Ibid. c. 40.

imprisoned or disseised or outlawed or exiled or in any manner destroyed, nor will we go upon him, nor will we send upon him, except by the lawful judgment of his peers or the law of the land."[1] We have already noticed John's tyrannical act in seizing the castles of the barons who declined, unless he kept his promises of reform, to accompany him to France in 1201.[2] Again in 1212 those suspected of defection were arrested and lost their castles.[3] These events may furnish a key to the demand of the barons for such a clause as the thirty-ninth.

"The words, 'We will not destroy him, nor will we go upon him, nor will we send upon him,' have been very differently expounded by different legal authorities. Their real meaning may be learned from John himself, who the next year promised by his letters patent . . . nec super eos *per vim vel per arma* ibimus, nisi per legem regni nostri, vel per judicium parium suorum in curia nostra. He had hitherto been in the habit of *going* with an armed force, or *sending* an armed force upon the lands, and against the castles, of all whom he knew or sus-

[1] *Mag. Cart.* c. 39.

[2] Roger de Hoveden, iv, 161, in Stubbs, *Sel. Chart.* (8th ed.) 272.

[3] Stubbs, *Const. Hist.* § 153.

pected to be his secret enemies, without observing any form of law. Thus in 1276 the peers, in conformity with this article of the charter, adjudged that the king should *go upon* Llewellyn, prince of Wales, quod *eat super* ipsum tanquam super rebellem suum et pacis suae perturbatorem." [1] Such being the state of affairs, it is little wonder that Magna Carta contains a clause restraining the king to a legal exercise of his prerogative,— a clause which, though often broken, has stood ever since as a bulwark of English liberty. The breaches have but brought reiteration of the principle, and reiteration has brought observance.

The provisions for the enforcement of the charter are interesting as showing how far the exigencies of tyranny had led the barons to claim self-government. To them was given the right to elect twenty-five of their number to "observe, keep and cause to be observed, the peace and liberties" which the charter had granted to them. If the king or any of his officers should injure any one in anything or violate any article of the charter, and complaint were made to four of the twenty-five, those four were to make petition of redress to the king or, if he

[1] 2 Lingard, *History of England* (6th ed.) 177, note 3.

were out of the kingdom, to his justiciar. If then no redress was had within forty days, the four barons were to lay the matter before the rest of the twenty-five, who then might distress and harass the king in any way they were able, even to the taking of castles, lands, and possessions, sparing only the persons of the royal family. Every man who took oath before the barons was to be absolutely privileged from interference from the crown because of the oath.[1] Never before had such powers of initiative in national affairs been allowed to subjects; never before had the king submitted to anything savoring so much of self-government.

While it was the barons, who, smarting under tyrannical impositions upon their land, struck those decisive blows which forced from the king this remarkable declaration of rights and liberties, they were the leaders of an aroused nation, now feeling its solidarity and strength. As the largest sufferers and the nearest to the king, it was the barons, lay and cleric, who were best fitted to direct the struggle and lead to victory. But they found support in all ranks, for every landowner felt the cruel impress of taxation, and even the villeins suffered in con-

[1] *Mag. Cart.* c. 61.

sequence. Perhaps the barons would not have won their point without this support. At any rate the more lowly men who had joined the common cause were not forgotten; the benefits of the charter were for all classes and conditions, and what the king agreed to do for the barons, the barons promised to do for their tenants, thus becoming enforcers of the liberties of the whole nation.[1]

While comparatively few of the provisions of Magna Carta stated novel rights and thus in this connection little may be claimed for the landed man in the way of originating liberties, it is of great significance that he even won from the king an admission of ancient principles. Those principles had been much in abeyance under a reign of tyranny, and were in serious danger of being lost sight of. Their statement by the king was salutary. While he might immediately proceed again to ignore them, he had left an indelible record for future reference. Theoretically there must henceforth be a reign of law. When the king overrode right, as often he did, here was a declaration of law incapable of denial, though not of evasion. Other charters had been forgotten; this one, purchased

[1] *Mag. Cart.* c. 60.

by a nation of united purpose at the cost of a memorable struggle, was never forgotten. When infringed by kings tenacious of prerogative, the people, cowed perhaps for a time into silence, would demand its renewal; and the kings, unable to dispute the published law, must again and again assent to its declaration of right. Thus Magna Carta has stood through the passing centuries as the bulwark of liberties whose reiteration has turned what was once precarious into what is now unshaken.

VI

THE BEGINNINGS OF PARLIAMENT

THE immediate gains to civil liberty from Magna Carta were principles rather than facts. Full as were the concessions to the power of the council to consent in taxation, there was not for some time anything like a parliament. Indeed the baronial party soon found that, as far as present reform was concerned, nothing was gained. Probably John signed the charter with the intention well formulated in his own mind to repudiate it as soon as he was no longer compelled to take the barons into consideration. However that might be, he continued to keep his followers in arms and to strengthen his forces. On the other side similar precautions were taken, and Magna Carta became an armed truce rather than a treaty of peace. Meanwhile the most powerful of the earls returned to the king. These defections from the cause of the barons grew out of several sources. In the first place jealousies arose which quickly divided the men whose grievances had so recently

served as a bond. Then some of them, slow to learn the perfidy of John, credited him with good intentions in executing the charter and went to his support as against those whose distrust kept them in open readiness for hostility to the king. Furthermore, in August, 1215, Pope Innocent III annulled the charter and forbade John to keep his oath. As a result, the clergy, who really were on the popular side, had to be very careful of showing any opposition to the king.

The worst fears of the barons as to John's good faith were fully justified at a time when their strength was thus on the ebb. The twenty-five executors became desperate and called for foreign aid, offering the crown to Louis of France. War was again precipitated, John reduced the North, and the rebellious barons were excommunicated. In the midst of the consequent discouragement of the baronial party, Louis arrived with a large force and turned the tide of victory. Many of the earls deserted the king, but a few remained faithful, notably the Earl of Pembroke. During the summer of 1216 the struggle continued, but England found relief in the deaths, in August of Pope Innocent, and in October of the tyrant John.[1]

[1] Stubbs, *Const. Hist.* § 169.

The country was doubly fortunate in the death of the king, for, besides being rid of John, it got as heir to the throne a nine-year-old boy. The minority of Henry III gave an opportunity for the barons, or at least some of them, to handle the reins of government. Thus the baronial party became rehabilitated and used to the exercise of power, while the people became accustomed to seeing somebody beside the king in authority and to look for sources of power elsewhere than in the crown. Then first began to arise the principle that the king (because he can do nothing) can do no wrong, and that the ministers who act for him are liable to the people.[1]

A powerful basis for the reunion of discordant elements was found in Magna Carta. With John and Innocent no longer obstructing, all were willing that the charter should be observed. The first act of the royal party, after crowning Henry III and appointing the Earl of Pembroke regent, was to republish Magna Carta with the consent of the papal legate, Gualo. The barons of the royal party and the new pope thus became the supporters of liberty. Many of the old baronial party there-

[1] 2 Anson, *Law and Custom of the Constitution*, 15.

upon changed front, but the obstinate and those who felt in honor bound to Louis, although standing for nearly the same principles as the royalists, did not see their way clear to support Henry. The baron executors, being given no power by the new issues of the charter, also opposed the young king. In danger of excommunication for opposition to the pope, Louis was called home by his father for a council. His absence was the signal for defections, and he returned to England to find a forlorn hope, which in September, 1217, became failure and surrender. The treaty then made was honorable to all. Nobody was to lose for the stand he had taken; all were pacified; everybody united in support of the young king; Magna Carta was again reissued.[1]

With the affairs of the nation under the direction of a regent elected by the Great Council, the conditions were apparently most favorable for the tenants-in-chief to exercise that power in taxation which Magna Carta had promised them. It is somewhat surprising therefore that in the republications of 1216 and 1217 the constitutional clauses[2] of the Great Charter find no place. The reason for the omission has al-

[1] Stubbs, *Const. Hist.* § 170. [2] *Mag. Cart.* cc. 12, 14.

ways been a subject of question, but no satisfactory solution has ever been given. Professor Gneist has ventured the suggestion that the greater barons, who under Pembroke were in power, were jealous of sharing their authority with the lesser.[1] Whatever the cause, the omission was not a grave one, for in practice the Great Council of specially summoned greater barons consented to taxation,[2] and finally the smaller tenants-in-chief by their representatives came to exercise similar privileges. The forty-fourth clause of the charter of 1217 provided that scutage should be taken as in the time of Henry II. The force of this provision is not clear, but as a scutage taken at nearly the same time was assessed by the *commune concilium* it can hardly be taken to mean that the tax could be laid without consent. In all matters of taxation, Pembroke seems to have consulted the Great Council.[3]

So also the principle of consent to taxation was consistently observed after the death of Pembroke in 1219. But in 1225 there came an event which, while in fact an exercise of the right to consent, was in form a precedent

[1] Gneist, *The English Parliament* (Shee translation) 88, 89.

[2] Ibid. 97. [3] Stubbs, *Const. Hist.* § 170.

for prerogative. The justiciar, Hubert de Burgh, demanded a fifteenth of all movables, which was granted on condition of a reconfirmation of the charters. The enacting clause did not, however, speak of the counsel of the barons, as in previous cases; on the contrary it referred to the confirmation as of the king's good will, while the magnates appeared only as witnesses. The theory of consent, however, continued to gain strength. In 1232 the prelates at a *colloquium* at Westminster objected to the grant of an aid for the French war on the ground that many of the bishops and abbots who had been summoned were not present, and sought adjournment until all could meet.[1] Such a claim exceeded even the right granted by Magna Carta, which specifically said that a baron summoned and not attending would be taken to assent to the action of those present. The following year the necessity of consent was illustrated by the embarrassment under which the barons put the king by refusing to obey a summons to council unless Henry would dismiss his foreign favorites. Such a refusal would hardly have been made and civil war would hardly have followed had not

[1] Matt. Paris, 372, in Stubbs, *Sel. Chart.* (8th ed.) 325.

the consent of the Great Council been more than an empty formality.[1] In spite of the omission of the 12th and 14th clauses of Magna Carta from the charters of 1216, 1217, and 1225, in spite of the 44th clause of that of 1217, common consent survived. The king's way of announcing the scutage of 1235 was that "the counts and barons and all others of our whole kingdom of England, *of their own will* and not as a customary exaction, have granted us an aid." [2]

Doubtless deliberation and debate had before this begun to mark the granting of taxes, for conditions were at times attached to concessions by the barons. The year 1242, however, furnishes us with the first detailed account of a debate in regard to taxation. Henry called the bishops and barons to London and requested an aid for the recovery of his foreign possessions. They replied that it would be wise to await the end of the truce then existing before going to war, representing that repeated and ample grants had been made during the last fifteen years, that besides these the king had plentiful resources; neverthe-

[1] Stubbs, *Const. Hist.* § 173.

[2] Stubbs, *Sel. Chart.* (8th ed.) 364.

less at the expiration of the truce they would do what they could. Henry asked how much they would grant if he waited, and hinted at reforms if they would be liberal. The council was not to be duped. Recalling that the grant of 1237 had been made upon condition that the money be put into the custody of certain magnates and spent under their direction, a condition which had not been fulfilled, the barons found reason to question the king's good faith, and refused to make any definite assurances. Henry did not, however, stop for constitutional obstructions; by treating with the prelates and barons singly, he succeeded by force, fraud, or persuasion in obtaining a large sum of money.[1] Thus the liberative tendencies were becoming more prominent, although the tyrannical forces were slow to yield.

It is of the utmost importance for our purpose to notice that all these battles in the struggle for political power were waged about taxation, for where fiscal matters were involved the landed man was primarily interested. It must be admitted that much of the hostility to Henry was due to his favoritism to foreigners, upon whom he lavished money and po-

[1] Stubbs, *Const. Hist.* § 175; *Sel. Chart.* (8th ed.) 368–370.

sition, but this hostility found opportunity for expression most readily in the times when the king asked for money. It was on such occasions that the barons were able to make demands and impose conditions which, though often disregarded, went far to strengthen the edifice of liberty. Formality of consent was gone; the council had attained the power of flat refusal.[1]

But the assemblies which were thus establishing, little by little, the practice of consent to taxation, were still far from being parliaments as we understand them. They were indeed often called by that name, but were in fact bodies of no fixed constitution. In them only the bishops and barons as a rule found seats; they were meetings of the larger landowners, specially summoned, and were in fact Great Councils. Important as were the principles which they were fixing, the legislative power of the subject could be fully vindicated only by a real parliament, with representatives of the smaller landowners of the shires and townships. To the old Germanic institutions the national legislature had to look for its vigor.

[1] Such refusal was repeatedly given. Stubbs, *Const. Hist.* § 175.

We have seen how the germ of popular government survived the migration and the rise of kings, survived even centralization and feudalization and tyranny, to flourish quietly but strongly in the shire and hundred and township. We have seen how, through the fiscal relations of the local courts to royal justice, trial by jury came about. More remarkable still was the way in which fiscal affairs brought those same Germanic institutions of shire and town into contact with national taxation and finally made the popular elements the essence of the national legislature; for "the lawmaker, the holder of the *legislative* power, is the real sovereign of the country." [1] In a matter of such significance, we may then be pardoned if we go back for a century and a half to weave together some of the threads of the fabric.

In the first place we must bear in mind that the shire court was a representative body, containing — besides the earls, bishops, and barons — the priest, reeve, and four men of each township. We must think of the township as "the body of alodial owners." "It is as an owner of land, or as a fully qualified

[1] Medley, *Stud. Man. of Eng. Const. Hist.* 58.

'lawful man' . . . that the freeman has rights and duties." [1] Among the rights of the free landowner of the township was the privilege of participation in the tun-gemot, which made by-laws, elected its own officers (the reeve, tithingman, and beadle), arranged the representation of its interests in the higher courts, and carried on certain matters of local fiscal and police administration.[2] Very likely the four men were *elected* by the free landowners; but even if they were not, they were their *representatives* in a very strict sense. Thus the principles of election and representation were found in the township.

After the Norman Conquest these principles came into close contact with national affairs through the inquests. That very earliest fiscal inquest, the Domesday Survey, was not made without recourse to the representative local machinery which was found conveniently at hand. The oaths were taken in the shire court by sworn representatives of the shire, of the hundred, and of the township.[3] During

[1] Stubbs, *Const. Hist.* § 39.

[2] Ibid. § 43. This was the case in free townships. Those dependent upon lords were somewhat restricted.

[3] Maitland, *D. B. and Beyond*, 10–12; Stubbs, *Const. Hist.* § 126.

the reign of Henry II fiscal inquests to determine the taxable property became very frequent. Necessarily they were made by men who knew the property which was to be assessed, by men of the locality. The local machinery was therefore naturally called upon to furnish men for the "juries." As a result the representative elements of government were brought into direct connection with the assessment of taxation, which was a step towards participation in the granting of taxes. Besides this the itinerant justices who took the inquests sat in the county courts and formed another link which facilitated the transfer of the principles of representation from local to national government.[1] Enough has been said in a previous chapter to make clear the influence which the landed man has exerted in this matter of the inquests. It only needs to be constantly borne in mind that both the local fiscal "recognition" and the growth of the power of the Great Council had to do with taxation. When the representative element joined the element of consent parliament came about. Before we come to their union, however, it will be well to note a few illustrations of the firm place

[1] Stubbs, *Const. Hist.* § 127.

which the elective principle won in the jury system and in the assessment of taxes during the end of the twelfth and the beginning of the thirteenth centuries.

The jury for the Grand Assize was elected by four knights summoned for that purpose by the sheriff.[1] The grand jury was in 1194 purely elective. Four knights were elected in each county, who upon their oath chose two lawful knights of each hundred, and those two in turn elected ten knights of each hundred, or if knights were lacking, lawful and free men, who with them made the jury of twelve.[2] This grand jury, among other things, elected the recognitors for all the assizes.[3] In 1198, elections for the Grand Assize were in the full county court.[4] Magna Carta provided that the assizes should be taken quarterly in the county court before two justices sent by the king and four knights chosen by the county.[5]

[1] Glanvill, *De Leg. Ang.* lib. ii, c. 12, in Stubbs, *Sel. Chart.* (8th ed.) 161.

[2] Forma Procedendi in Placitis Coronae Regis, in Stubbs, *Sel. Chart.* (8th ed.) 259.

[3] Ibid. Art. 2.

[4] Roger de Hoveden, iv, 61, in Stubbs, *Sel. Chart.* (8th ed.) 258.

[5] *Mag. Cart.* c. 18. Cf. Stubbs, *Const. Hist.* § 164.

Coming now to inquests which were fiscal rather than judicial, we find that in 1181 Henry II determined the liability of his subjects to keep arms for service in the militia by means of the oath before his justices of "lawful knights or other free and lawful men of the hundred and boroughs."[1] We do not know that these "jurors" were elected, but at any rate another point of contact was offered between national affairs and the representative system of the local courts. The Saladin Tithe of 1188 afforded another opportunity to make use of the inquest. In cases where any were suspected of not voluntarily returning the proper amount, the rating was to be settled by the oath of four or six lawful men elected (we are not told how) from the parish.[2] In 1194 the itinerant justices were aided in determining the king's fiscal rights by a jury of "twelve lawful knights or free and lawful men" elected by the knights of the shire.[3] Four years later, to collect a carucage, "the king sent through each county a clerk and a knight, who, with the sheriff of

[1] Assize of Arms, Art. 9, in Stubbs, *Sel. Chart.* (8th ed.) 154.

[2] Benedict, ii, 31, in Ibid. 160.

[3] Forma Procedendi, Art. 23, in Stubbs, *Sel. Chart.* (8th ed.) 259.

the county to which they were sent and with lawful knights elected for this purpose, caused to appear before them (1) the stewards of the barons of that county, (2) from each township the lord or the bailiff of the township and the reeve with four lawful men of the township, whether free or villein, and (3) from the hundred two of the more lawful knights;" which men took oath to a new Domesday Inquest.[1]

By the year 1220 a great advance in the notion of popular election and representation was made apparent by the method of collecting a carucage, which was by two knights chosen in the full assembly of the shire and "by the will and counsel of all of the county."[2] Five years later a fifteenth was assessed and collected by a system combining all previous methods. The taxpayer first made oath to the value of his property, and, in case of dispute, a jury was called in. The money was collected by the reeve and four men of each township and paid by them to four knights elected in the hundred, who in turn passed it on to the agents of the king.[3] Again in 1232 a fortieth

[1] Roger de Hoveden, iv, 46, in Stubbs, *Sel. Chart.* (8th ed.) 256.
[2] Stubbs, *Sel. Chart.* (8th ed.) 352. [3] Ibid. 355.

was assessed in each township by four men and the reeve on oath. The four men, who were to be of the better and more lawful kind, were elected. This tax was granted by the "archbishops, bishops, abbots, priors, clergy, earls, barons, knights, freemen and villeins." Either the freeholders and villeins were consulted in the county court or the lords were taken to represent their tenants in the Great Council. In either case the theory of consent was passing down to the lower ranks of the territorial scale; while if the latter be true, the theory of representation was gaining ground in the national assembly.[1] Even although the only significance of the tax were its assessment by elected men, that was much; for the representatives of the people were stating the extent of their liability to pay, and that is very closely related to consent to any liability to be taxed at all.[2] In connection with the thirtieth of 1237 we find the lords acting in the grant *pro se et suis villanis*, in a representative capacity. This time the aid was assessed by four lawful men elected by each township.[3]

[1] Stubbs, *Sel. Chart.* (8th ed.) 360.
[2] 1 Palgrave, *Eng. Com.* 275, 276.
[3] Stubbs, *Sel. Chart.* (8th ed.) 366.

These repeated uses of the elective and representative principles in the assessment and collection of national taxes were rapidly preparing the way for a parliament in which the whole people would have a share. An assembly analogous to parliament already existed in the shire court which, with its "archbishops, bishops, abbots, priors, earls, barons, knights, and all free tenants of the whole county, together with the four men and the reeve from each township and the twelve lawful men from each borough," contained all the elements of the later national legislature. All of them, it is to be noticed, were landed men, even the "lawful man" had of necessity his real property. Yet these elements were "distinctly Teutonic in origin, and not a creation of feudalism." Thus had the ancient national institutions survived in the township and shire in order that now, brought into contact with the central administration by the fiscal business upon which the king's officers went into the shire, they might become the groundwork of the new national institution.[1]

Already the elective and representative principles, first observed to reach out towards

[1] Stubbs, *Sel. Chart.* (8th ed.) 358.

national affairs in the matter of taxation, had shown themselves in other branches of national activity. In 1198 coroners began to be elected in the counties to keep the pleas of the crown.[1] Magna Carta provided that all bad customs of the forests should be inquired into in each county by twelve sworn knights of the same county, who should be elected by the *probi homines* of the county.[2] A writ is extant calling for the election, by the knights and *probi homines* of the county, of four of the more lawful and discreet men to inquire into the disputed interpretation of some articles of the Great Charter. Such an inquest was strictly neither judicial nor financial, but, as Bishop Stubbs remarks, is more of the character of political deliberation than anything hitherto laid before a jury.[3]

The actual entrance of the representatives of the small landowners into the national assembly was, however, deferred until the theory of consent became a somewhat more established practice. But before that came about, there were several Great Councils attended by representatives of a part of the people. As

[1] Forma Procedendi, Art. 20, in Ibid. 259.

[2] *Mag. Cart.* c. 48. [3] Stubbs, *Sel. Chart.* (8th ed.) 357.

these served as important precedents for more perfect representation, we must briefly look at them. We begin with that assembly called together by the justiciar at S. Alban's upon August 4, 1213, a date worthy of memory in the history of liberty. It was attended by the usual bishops and barons, and in addition by the reeve and four men of each township. These last-named were present to give inquest as to the value of the lands for which the church demanded restitution at the hands of the king. The township men had not yet passed beyond the stage of the inquest, but it was through the inquest that they won a place in legislation, and now they made a great leap towards the desired goal by making an inquest in the national assembly. Furthermore larger questions than the assessment of damages were brought before the whole body, and the representative men were treated as a part of the council for the hearing of the grievances with which the faithlessness of the king had burdened the whole nation.[1] Popular representation acquired another precedent with the writ of John dated November 7, 1213, and summoning to Oxford a council in which the

[1] Stubbs, *Const. Hist.* § 154.

barons and four discreet men of the shire were to meet "to speak with us concerning the business of our realm." [1] Whether or not the assembly actually convened, we do not know.[2]

For another instance of county representation we have to wait for over forty years. The kingdom was in 1253 left in the care of the queen and Earl Richard, while Henry III made an expedition to Gascony. Money was needed for the campaign, and the regents called to council the prelates and magnates, who for themselves promised an aid. So strong had become the principle of consent that even the prelates would not answer for the rest of the clergy, who were not represented. They did indeed express the opinion that the clergy might follow their example if the tenth granted for the crusade were given up or postponed, but this was probably not said by them as representatives of the lesser clergy. Likewise the barons consented to go to Gascony, but would not answer for the rest of the laity, who, however, might go if the charters were confirmed. In this state of affairs it seemed necessary for the regents to treat with those who had au-

[1] Stubbs, *Sel. Chart.* (8th ed.) 286.

[2] Stubbs, *Const. Hist.* § 154.

thority to bind the lesser subjects. Hence there was convened at Westminster on April 26, 1254, a Great Council, to which were summoned two knights to be chosen by each county court and representatives of the clergy of each diocese, who were to report how large an aid their constituents were able to give. The reiteration of grievances was the only thing which the assembly accomplished, but the very meeting of such a body was full of promise for the future.[1]

The next three or four years were marked by an unceasing struggle between the king and the barons. Foreign favorites received princely gifts from the funds which Henry should have spent for public purposes. The war in Gascony had been financially disastrous; the king was a bankrupt. Then the pope conceived the idea of selling the crown of Sicily to Henry, who was intimidated into agreeing to take it for his second son Edmund. Not only was a further debt of 140,000 marks thus contracted, but the king was also plunged into another war and the nation put in danger of the influx of more aliens. Henry's cry became more than

[1] Stubbs, *Const. Hist.* § 175; Stubbs, *Sel. Chart.* (8th ed.) 375.

ever for money, while more than ever the barons resisted. For the first time on record the magnates in 1255 refused an aid on the ground that they had not been summoned in the manner prescribed by Magna Carta. The king had the support of some of the greatest earls, as well as of his prosperous alien friends, who enjoyed the power which castles and revenues and the infringement of law gave; but they alone could not maintain the king, who needed the financial aid of the large body of unorganized owners of taxable property. So it came about that in 1258 the refusal of the Great Council to grant the king's demand for money except upon terms of reform forced Henry for the time to put himself in the hands of the barons. A committee of twenty-four, half from the royal council and half chosen by the barons, were to enforce temporary reforms. Meanwhile the assembly adjourned pending the formulation of a scheme for government.

When the council met at Oxford on the 11th of June, it was as a full assembly of the baronage and higher clergy, the former in arms. Called by Henry's followers the Mad Parliament, it had the courage, whether wisely or not, to make constitutional demands far in advance of the

times. These demands, formulated in the Provisions of Oxford, required that all public acts of the king be under the restraint of a council of fifteen, chosen by four of the committee of twenty-four, two elected from the king's half of that committee by the barons' half, and two from the barons' twelve by the king's twelve. This council of fifteen, besides exercising a control over administrative affairs which was not to be confirmed as a right of the people for five hundred years, and then only by indirection, was to be given a legislative power of an unfortunate sort. Three times a year it was to meet in parliament twelve others chosen by the barons to discuss common business in behalf of the whole community.[1] It was thus a reproach to the new system that it was oligarchic and left without recognition the principle of representation which had been so long developing itself. Such an omission was a source of immediate weakness, for although the subject's right to be heard was partially vindicated, the Provisions were not a complete expression of the notion of consent, which was already far outstripping the

[1] For the documents relating to the Provisions, see Stubbs, *Sel. Chart.* (8th ed.) 378 et seq. Cf. Stubbs, *Const. Hist.* § 176.

idea of 1215 that only the barons had rights in the granting of taxes.

The barons, or a considerable portion of them, were dilatory in carrying out the reforms. Those who had joined the movement against the king for purely selfish motives were satisfied with the mere gaining of their private ends. This left the knights, the landowners next below the baronage, still suffering wrongs. They found a friend in Edward, the king's son, who urged their rights before the council, with the result that some of the reforms were forwarded. Associated with Edward in the cause of liberty for the lower ranks was Simon de Montfort, shortly to become the leader of the opposition to the king in the struggle of liberty. The new government began to break up, but the king did not find himself able to have his own way. Each party distrusted the other and prepared for war.

It was under such conditions that the chiefs of the crumbling provisional government, Simon de Montfort, the Earl of Gloucester, and the Bishop of Worcester, summoned to S. Alban's the assembly of 1261, which marks the third occasion when knights (this time three from each shire) were invited to attend

a national council. De Montfort, as leader of the progressive barons, probably saw in this a means to strengthen his party for the armed conflict which seemed imminent. The knights had much in common with the barons, for as landowners they had an interest in the movement of the day, which was very like that of the tenants-in-chief in kind, although in degree it was less. An amalgamation of the two bodies meant present power and future permanence in the legislative department. The king feared the present power and therefore ordered the sheriffs to send the knights, not to S. Alban's, but to Windsor, where he proposed to treat for peace. No immediate gain came from either summons, but the king had put himself upon record as approving a recognition of the knights which the barons had conceded. There was added another precedent to representation in parliament and to the union therein of all the estates.[1]

Edward became reconciled to his father, a truce was obtained and settlement of the differences between Simon and the king sought by arbitration. Simon himself went abroad, and for a time open war was delayed. Upon

[1] Stubbs, *Const. Hist.* § 176.

De Montfort's return and the failure of arbitration, matters came soon to a head. Simon demanded a reconfirmation of the Provisions of Oxford and upon the king's refusal began war. Henry was forced to a reluctant promise to observe the Provisions, but Edward held out for a time. Then arrangements were finally made to refer the whole matter to Louis IX of France. The arbitrator gave a judgment annulling the Provisions and leaving Henry his former freedom to appoint ministers, council, and sheriffs, as well as to employ aliens, whose favors political and financial at the hands of the king had been one fruitful source of discontent.[1] Such a decision was not to be borne. Open war ensued, and at the battle of Lewes, in May, 1264, Henry became the barons' prisoner. To the assembly which was immediately convened by De Montfort in the name of the king, to determine a new scheme of government, were summoned four knights of the shire elected in the county court. Another parliament in the early part of 1265 completed the arrangements for the new order of things, and this marks the real beginning of the modern English legislature. To it were summoned all

[1] Stubbs, *Const. Hist.* § 176.

the bishops, abbots, and barons who were not hostile to the new order of things, two knights of each shire and two representatives of each borough and city. There was no order for the election of the representative members, but the custom of election was too well established not to be observed on this occasion. Thus for the first time we see combined the old *commune concilium* with the elected representatives of the small freeholders and burgesses. In a body of such model all landed men except the lesser clergy had some voice, direct or indirect.

The victory, although important in ultimate results, was short-lived. De Montfort was defeated and slain in battle the same year, Henry was freed, the baronial party reduced. But remnants of the victory remained, for after the subjugation of the barons Henry yet found it wise to summon the Parliament of Marlborough (1267) and to concede all the Provisions of Oxford except the demands for the appointment of ministers by the council and the election of sheriffs. It is even deemed probable that the knights of the shire participated in these proceedings, although the representatives of town and city did not.[1] A power once

[1] Stubbs, *Const. Hist.* § 177. Cf. the writs in Stubbs, *Sel. Chart.* (8th ed.) 411, 415.

exercised by the people at the expense of the sovereign can never be fully recovered to the prerogative. A great assembly in 1269 was attended by the more powerful men of the cities and boroughs.[1]

The baronial party was completely routed, and in a position to offer no more resistance during Henry's last years. When Edward I succeeded to the throne in 1272, England became blessed with a king who, while claiming the right to sovereign authority, had yet some sympathy with the people. Edward was a strong king, but his strength did not lie solely in the firm hand with which he carried out his own purposes; he was equally steadfast in holding faith when his subjects forced from him concessions of sovereignty. He became king of the whole people, without opposition or even question, and received in 1273 the allegiance of all his subjects through the oath of a convention composed not only of the prelates and barons, but also of four knights from each shire and four citizens of each city. This convention also confirmed the provision which, pending Edward's return from the crusade, the royal council had made for the government

[1] Stubbs, *Const. Hist.* § 178.

of the nation under the regency of the Archbishop of York.[1]

The first general parliament of Edward I, in April, 1275, enacted the Statute of Westminster the First, whose preamble speaks of "the community of the realm thither summoned." [2] Whether or not we are to infer that representatives of the shires and townships were members of the assembly, the statute does certainly illustrate the hold which the elective principle had gained. In it we read, "Because elections ought to be free, the king commandeth upon great forfeiture that no man by force of arms, nor by malice or menacing, shall disturb any to make free election." [3] The statute covers a very wide field, promising to all common right; forbidding excessive amercements, abuses of wardship, irregular demands for feudal aids; reviewing the inquest system, the Provisions of Oxford, and other important things. The price of the legislation was a grant of custom: half a mark on each sack of wool or three hundred woolfells, one mark on each last of leather going out of the country. Wool

[1] Ann. Win. 113, in Stubbs, *Sel. Chart.* (8th ed.) 429.

[2] Cf. Patent Roll, July 24, 1276, in Stubbs, *Sel. Chart.* (8th ed.) 430.

[3] Stat. West. I, c. v, in Ibid. 450.

had long, as the staple product of England, been the desired object of taxation, but never before had there been a legislative enactment regarding it. Henceforth it became an important factor in fiscal affairs.[1]

Later in the same year of 1275, during the month of October, another *magnum parliamentum* made laws touching the Jews, and granted a subsidy of a fifteenth, and to this parliament were surely summoned two elected knights of each county.[2] For eight years Edward got along with only this one general grant. A scutage was taken in 1277. In a time of such light taxation there was little opportunity for the representative system to confirm itself. But the king did need money, and in order to get it he had at least to recognize the principle of consent. In his reluctance to go to parliament for it, he made separate agreements with individuals and communities for grants and subsidies.[3] The returns not proving sufficient, Edward next called two provincial councils, one for York and the other for Canterbury.

[1] Stubbs, *Sel. Chart.* (8th ed.) 448–452.

[2] Ann. Winton, 119, and Close Rolls, Oct. 24, in Ibid. 430; Stubbs, *Const. Hist.* § 214.

[3] Writ No. 1 in Stubbs, *Sel. Chart.* (8th ed.) 464.

Both clergy and laity attended each, while four knights of each shire and two men of each city, borough, or market town were also summoned, as were all freeholders capable of bearing arms and holding more than a knight's fee.[1]

These events were in 1282. Again there was no further call for a general tax for several years, although for the trial of David of Wales the king in 1283 gathered an assembly to which representatives of shire and town were summoned.[2] From 1286 until 1289, the king was in France, with his chancellor. In the latter year he sent over asking the magnates for an aid. The answer was that none should be forthcoming until the king returned. Edward hastened back and heard the complaints of ill-doing on the part of the judges in the chancellor's absence. Some of the judges were removed, and then came the three parliaments of 1290, to the second of which two or three elected knights of each shire were summoned.[4]

One of the acts of the year, passed before

[1] Stubbs, *Sel. Chart.* (8th ed.) 465.

[2] Stubbs, *Const. Hist.* § 179.

[3] Ann. Osney, 316, 318; Ann. Waverl. 408, in Stubbs, *Sel. Chart.* (8th ed.) 434–435.

[4] Writ No. II, in Ibid. 477.

the knights came to the assembly, was the Statute Quia Emptores, designed to avoid the process of subinfeudation, by which free tenants sold lands in such manner that the purchasers held by services due to the sellers. The lord of the seller was thus often deprived of the escheat, wardship, and marriage of the lands sold, "which things indeed seemed very hard and extreme to the magnates and other lords." Hence the king, "at the instance of his magnates," granted that it should be lawful for lands to be sold only in such manner that the grantee should hold them by the same services and customs by which his grantor had held.[1] This act was the supplement to the Statute of Mortmain in which eleven years previous the king had decreed that, because "lords in chief lost their escheats," estates should not be put into the hands of the church so as to free them from services.[2] These statutes — ordinances, rather, for they were not acts of parliament — originated, indeed, in the greed of the king and of the great landlords, but they yet had a wonderfully good influence upon the liberties of England, which merits passing comment. Not only did the

[1] Stubbs, *Sel. Chart.* (8th ed.) 478. [2] Ibid. 458.

doing away with subinfeudation overcome some of the destructive forces of feudalism; it also made the lot of the humble people more bearable by avoiding the multiplication of mesne lords between sovereign and villein.[1]

The next and final steps towards a representative parliament came in 1294 and 1295, and, as might be expected, were the results of further attempts to raise money. Suddenly plunged into a war with France, Edward found it imperative in the former year to have supplies without delay. He therefore made some arbitrary seizures,[2] but recognized the constitutional procedure by summoning the prelates to meet in September at Westminster, whither he also called elected representatives of the lower clergy.[3] In November another convocation was had at Westminster, to which were summoned the magnates and four knights to be elected in each county court.[4]

To the French war was added a Welsh rebellion, and Edward's wants became proportionally grievous. A Great Council held in

[1] Stubbs, *Const. Hist.* § 264.

[2] Chron. W. de Hemingburgh, ii, 53, 54, in Stubbs, *Sel. Chart.* (8th ed.) 437.

[3] Writ No. I, in Ibid. 480.

[4] Writ No. II, in Ibid. 481.

the summer of 1295 does not seem to have tided affairs over for long, and in the late autumn he adopted the expedient of a model parliament. Variously constituted bodies had been tried previously, as occasion demanded. Once [1] the knights of the shire and representatives of the cities and boroughs were both summoned; sometimes only the knights were called; again both of them were omitted and the barons granted aids in behalf of the commonalty, as well as of themselves. Sometimes the king treated separately with the different estates, — clergy, lords and commons, — and obtained grants from each. The period had been one of transition and of doubt, and no definite system had been evolved beyond the principle of consent. Separate dealing with the estates or with the counties or boroughs was cumbersome and unsatisfactory, while the returns were insufficient. In the emergency of war, Edward I now needed the actual common counsel of the whole realm, and he needed as well an adequate grant of money. A representative parliament combining all the elements previously used, and able to tax the whole nation, was his refuge. Hence the writs

[1] In 1265, when the lesser clergy were unrepresented.

of September and October, 1295, summoned (1) the prelates and the representatives of the lesser clergy,[1] (2) the barons,[2] (3) two elected knights from each shire, two elected citizens of each city and two elected burgesses of each borough, who should have power to act in behalf of their communities.[3] This was the beginning of the perfect parliament. Apparently the aid granted was discussed by each of the three estates separately, for each voted a different fraction of their movables,[4] but the complete representation of all the landed men of the nation above a modest rating was obtained, and more perfect unity was the natural and necessary result. From that time extends an almost continuous succession of parliaments of the De Montfort type, with representatives of the three estates, clergy, barons and commons.

A backward glance over the ground just traversed will serve to impress us afresh with the intimate relations of the landed men to the movement towards parliament. Let us

[1] Writ No. II, in Stubbs, *Sel. Chart.* (8th ed.) 484.
[2] Writ No. III, in Ibid. 485.
[3] Writ No. IV, in Ibid. 486.
[4] Writ No. V, in Ibid. 486.

look at the chief elements which combined to make up the institution. First in point of time was that principle of popular government found in the Germanic tribal assembly. This was a seed of such marvelous vitality that it lived through the migration to England and the rise of kings. The process of amalgamation, while neglecting this principle in the national structure, left it fully operative in the shire, which corresponded somewhat roughly to the old tribal limits. Locally the principle persisted for centuries, a right enjoyed by the free landowner. Quite independent of this element, there grew up in the nation a theory that the great landowners, as having the largest interests, should consent to taxation. It required centuries of growth to establish the principle as a theory, but just as it was becoming fixed, there arose that system of inquests, designed to secure the fiscal rights of the king against the landowners, which brought national taxation into close touch with the representative local institutions. Concurrently came the extension of the principle of consent down the territorial scale to the smaller freeholders who enjoyed the elective franchise and the right of representation in shire affairs. Then these

elements of election, representation, and consent, brought together by force of the king's need and the landowners' pressure for recognition, joined to make parliament.

Once parliament was firmly constituted, it promptly established its primary right, supreme power in taxation. Like nearly every instance of encroachment upon prerogative, this happened because the king wanted money. A full parliament of all the estates was held in 1296 at S. Edmund's to raise money to recover Gascony. As was the case the year before, the three estates voted separately, the barons and knights giving a twelfth, the cities and boroughs an eighth. But the clergy, forbidden by a papal bull to pay any taxes levied by lay princes, would make no grant.[1] When they persisted in their refusal, the king outlawed them and seized their property.[2] Next the barons alone were summoned to Salisbury and asked to serve in Gascony. They refused, and Edward was provoked to arbitrary procedure the like of which he never at any other

[1] Ann. Trivet, 352, and Patent Rolls, Dec. 16, in Stubbs, *Sel. Chart.* (8th ed.) 439.

[2] Ann. Trivet, 353, in Ibid. 440.

[3] W. de Hemingburgh, ii, 121, in Ibid. 440.

time attempted. This was the seizure of wool, an illegal step which stirred up so great an opposition that it was placed out of the power of the king to take it again. Each county was at the same time ordered to furnish supplies of wheat, oats, beef and pork.[1] Fuel was added to the flame of popular indignation by a further demand upon the barons for foreign military service. Edward still needed money and again asked for it, only to meet with another rebuff.[2] But he succeeded in getting together a few subservient men who had no summons and no representative authority, and who readily granted, ostensibly in behalf of people who were not their constituents, an eighth for the barons and knights and a fifth for the towns.[3] Edward soon sailed for Flanders, but not until the incensed barons had drawn up and presented a list of grievances which the king avoided answering by his departure.[4] Shortly before he left, Edward issued letters for the collection of the eighth and fifth which had been "granted" and of a third of the lay fees of the

[1] W. de Hemingburgh, ii, 119, in Stubbs, *Sel. Chart.* (8th ed.) 440.

[2] Matt. Westm. 430, in Ibid. 441.

[3] Patent Rolls, July 30, in Ibid. 442.

[4] Rishanger, 175, in Ibid. 442.

clergy. He also made another seizure of wool, as well as of corn and other supplies. Lastly he left a summons for the barons and knights who were staying at home to follow with his son Edward the next month.

But the leaders of the barons, Bohun and Bigod, were alert. On the very day before the sailing they forbade the Barons of the Exchequer to collect the aid, on the ground that without consent no tax ought to be exacted or laid.[1] The king learned of this just as he was sailing, but commanded the Exchequer to make the collection, under a proclamation, however, that it should not stand as a precedent; the wool was to be taken, but only by way of purchase. The young prince, who was left as regent, received similar instructions. But this was not satisfactory to the aroused barons, who forced the prince to summon a parliament of prelates, barons, and knights of the shire, the towns and inferior clergy not being represented.[2] This parliament secured from the regent a confirmation of the charters, annulled the aid of an eighth and a fifth, and, its rights thus recognized, granted an aid of a

[1] Matt. West. 430, in Stubbs, *Sel. Chart.* (8th ed.) 444.

[2] W. de Hemingburgh, ii, 147, in Ibid. 444.

ninth from the laity assembled. This grant was later extended to the towns. The king confirmed the regent's acts, and salved feelings permitted the clergy to come to Edward's aid, when, shortly afterwards, the Scots invaded the north. While the papal bull had forbidden the clergy to pay exactions laid by the laity, it did not prohibit a voluntary offering. Hence the southern province, for the defense of the country, granted a tenth, while the northern province gave a fifth. It was not that the subject would be free from taxation, but that he would be supreme in it. Theoretically he won his point, although it was tumultuously and in a parliament not perfectly constituted, for the king granted that he and his heirs would "for no business from henceforth . . . take such manner of aids, tasks nor prises, but by the common assent of the realm, and for the common profit thereof, saving the ancient aids and prises due and accustomed." [1]

In calling the parliament of 1295 Edward I had laid down the principle that "that which touches all should be approved by all" and

[1] Confirmatio Cartarum, vi, in Stubbs, *Sel. Chart.* (8th ed.) 496. As to all the events of 1296 and 1297, see Stubbs, *Const. Hist.* § 180, and *Sel. Chart.* 487.

"common dangers must be met by measures concerted in common." [1] This was intended immediately to refer only to discussion in parliament concerning supplies for the war with France, but was of so universal a nature that its application to general legislation could not fail to be seen. In the making of law, then, parliament must soon claim supreme power. A very simple explanation of the process by which parliament won this its second right would be that it received it as the successor of the Great Council, but this would not be true. Parliament did attract to itself the legislative power of the Great Council, but the older body did not at once pass away, was not succeeded by the newer. When in taxation the broader application of the principle of consent became recognized, a new body representative of all taxpayers grew up and attracted to itself the right of assent. Probably parliament was not at the time looked upon as in any way the successor of the Great Council, but rather as its supplanter in one line of activity. Therefore no such simple argument could have been stated by the men of the year 1300 as that parliament, being the successor of the Great Coun-

[1] Writ II, Stubbs, *Sel. Chart.* (8th ed.) 484.

cil, should have its legislative power, as it had the taxative. If such a formula had been possible, the commons would have shared with the lords the judicial power which the latter got when the Great Council lost it.

What, then, was the process by which the representative body won its right in law-making? In early times, it has been argued, the publication of new laws in the shiremoot may have been deemed necessary for their validity. The people accepted the laws of Edgar and Edward in the days of Canute and of William I, and Magna Carta and the Provisions of Oxford were promulgated in the county courts, where all men were bound by oath to obey them.[1] But such procedure looked rather to the execution than to the making of laws. It did indeed point toward the consent of the people to legislation, but only remotely. That such consent was coming to have some recognition in theory, the general trend of events in the thirteenth century indicates. Even the king enunciated the ideal which was rising in men's minds when he called the parliament of 1295. The practice of legislation in parliament, while in part the realization of this belief

[1] Stubbs, *Const. Hist.* § 224.

which had been growing up, was, however, won by the use or non-use of the primary power of taxation. "The admission of the right of parliament to legislate, to inquire into abuses, and to share in the guidance of national policy, was practically purchased by the money granted to Edward I and Edward III." [1]

The Confirmatio Cartarum furnishes a striking example of the process of bargain and sale, it being distinctly understood that the grant of parliament was in return for the re-enactment of Magna Carta and the enactment of a law recognizing the right of the people in the matter of taxation. Again in 1300, in return for the vote of a fifteenth,[2] Edward I granted in parliament twenty articles in addition to the charters. These Articuli Super Cartas covered a wide range of legislation, touching upon remedies for abuses of the charters, the restraint of purveyance, reform of the jury system, the assaying of gold and silver, forest reforms, and the jurisdiction of courts. In the following year the carrying out of these reforms and another confirmation of the charters were demanded and granted as the con-

[1] Stubbs, *Const. Hist.* § 289.

[2] Matt. Westm. 433, in Stubbs, *Sel. Chart.* (8th ed.) 446.

ditions of a vote of money.[1] Further illustrations of the growth of legislative power in this manner will be noticed later, but these will suffice to show the process by which parliament entrenched itself. The victory which the people had won was recognized by the coronation oath of Edward II. "Do you grant," he was asked, "to hold and to keep the laws and righteous customs which the community of your realm shall have chosen, and will you defend and strengthen them to the honor of God, to the utmost of your power?" "I grant and promise," was the reply.[2] As we shall shortly see, the victory was far from perfect, and the power of parliament in legislation was theoretical rather than practical; yet, as we have already had many occasions to notice, a theory of liberty is the basis of a vindicated right. The share of the landowner as a taxpayer in forcing the recognition of the theory is of the highest importance; his contribution to the establishment of the practice is a subject for further discussion.

[1] Stubbs, *Const. Hist.* § 181. [2] Ibid. § 249.

VII

THE GROWTH OF PARLIAMENT

In spite of the theoretical establishment of the principle that action by parliament was essential in taxation and legislation, there still remained in the crown a residuum of prerogative which made it possible for the king often to ignore the representative assembly. It was not until parliament had removed this obstacle that popular rights were fully vindicated, and this was virtually accomplished in the fourteenth and fifteenth centuries, — a very brief time, if we but remember that prerogative was custom and as such a part of the constitution. Since it is inroad upon prerogative that marks the growth of parliament, we must first get some idea of the body called the continual council through which, in the main, the king exercised his ancient rights. As we shall have little more occasion to speak of the Commune Concilium or Great Council as an active body, it will be understood that "council" hereafter means the smaller continual council.

From the very earliest times English kings had about them a body of household retainers and servants who relieved them of such portions of their official duties as they were unable personally to perform. Even the German *princeps* had his *comitatus*, perhaps the ancestor of the Privy Council. In the time of the Norman and early Plantagenet kings, there was the Curia Regis, composed of appointees of the crown, living for the most part in the royal household, always near the king, and aiding him in all administrative and judicial affairs. As early as the reign of Henry II, traces are found of the recognition of the king's private advisers and officers of household, state, and court as a somewhat definite body, but it was only in the minority of Henry III that a royal council first became distinguished from the judicial bodies of the Curia Regis and from the Great Council. It was not then a clearly defined body of men with powers absolutely fixed, but it probably contained the officers of household and state, the whole judicial staff, some bishops and barons, and a few other advisers. It was a permanent resident council always ready to act with the king upon any emergency. Its members had their duties in

the various departments of justice and business administration which well qualified them for action with the king upon questions of general policy which arose from time to time. What distinguished them as a council was that, aside from their departmental duties, they had a distinct function as counselors deliberating upon matters of general policy, planning the business of state, formulating the king's demand for taxation, and framing legislation. In origin the council was an executive body; what authority it had in legislation, taxation, and judicature represented the prerogative which the crown retained.[1]

The powers of the council had long been accruing and were such as might be expected to center in a body of executive officials to whom the king had for a long time delegated much of his regular business. It only needed that the ministers should come to feel an *esprit de corps* and to exercise their offices without royal interference, as during the minority of Henry III, for them to become a distinct feature of the constitution, a body with an influence to be counted upon. This influence, as Profes-

[1] Stubbs, *Const. Hist.* §§ 171, 230; 2 Anson, *Law and Custom of the Constitution*, 84.

sor Dicey has said, was paradoxical. "The same body was at once the controller and the servant of the Crown; the channel through which the royal mandates passed, the instrument of the prerogative; and at the same time the check on the King's power, the curb placed by the aristocracy on the arbitrary exercise of his will. Hence increase of the Council's influence means, at one period of history, a limitation of the prerogative; at another, as for instance in the sixteenth century, an addition to the royal authority." [1] The paradox is explained in this way: The council was an assembly of purely royal officials, owing its existence to the king's pleasure and acting always in his name. Its members were really servants of the king, yet they were able often to check him; for while, with the exception of a few hereditary officers, they were appointed and dismissed at the king's will, they were often because of their power indispensable to the crown.[2] Then, too, the value of their advice was a constant source of influence.[3] Another fact which added to the check which they exerted on the king was that the bishops in the

[1] Dicey, *The Privy Council* (ed. 1887) 29.
[2] Ibid. 31. [3] Ibid. 33.

council were virtual representatives of the clergy, who soon ceased to attend parliament and granted taxes separately in convocation; while the nobles, who were in the majority in the council, had great estates and local influence which made it possible for them to treat with the king on an independent footing.

In so far as the council acted as a check upon the king, it was an influence making for liberty. Imperfect it indeed was, because not representative, but it was effectual in taking some of the actual exercise of prerogative from the crown. In so far as it was subservient to the king, it was an obstacle to popular liberty, hence more and more, as we shall later see, parliament attempted to control the council. It is worthy of remark that when the council, as under the Lancastrians, was made up of feudal lords, it was a check upon the king. When, however, under the early Tudors its members were men of no great estate, it was the tool of the king.[1] It is fair to say that whatever influence the council had in lessening prerogative was exerted, if not always in the interest of land, at least by landed men.

While the council often invaded the king's

[1] 2 Anson, *Law and Cust.* 86.

peculiar reserve of authority, it must not be thought that that reserve was soon exhausted. On the contrary it continued through the fourteenth and fifteenth centuries to offer many points of resistance to the growth of popular rights, and nearly always it was not the king alone, but the king in council, which was the medium through which prerogative found expression. It is a large field of inquiry that is opened before us, but it may be well to review it as briefly as may be, for in so doing we shall be able to follow the growth of parliament. Let us first consider the operation of prerogative in the field of taxation, where parliament earliest established its theoretical supremacy.

There can be no question that the spirit of the Confirmatio Cartarum was that the king should take no tax without the consent of parliament. Yet the crown found loopholes for the exercise of arbitrary taxation which caused the people great annoyance, and but for their sturdy resistance might have nullified the great concessions which had been made. This same Confirmatio Cartarum has often been taken as forbidding tallage without consent, but the word *tallagium* was not used in the statute,

which renounced "*aides, mises et prises.*" A king tenacious of prerogative could with plausibility argue that this meant only contributions levied upon the kingdom at large without consent, and did not apply to demands made according to feudal right upon crown lands. So the first three Edwards tallaged their demesne lands in spite of the spirit of the law. In 1340, however, the commons named as one of the conditions of the grant of a custom the enactment of a statute that the nation should "no more be charged or grieved to make any common aid or sustain charge, except by the common assent" of the estates, "and that in parliament." [1] Again in 1348, the commons attached to a grant the condition that no tallage or similar exaction should be imposed by the council.[2] Further assurances against tallage were given by Edward III in 1352 and 1377, evidently to confirm a doubting parliament, for never after 1332 was demesne tallaged, although Edward often broke the statute of 1340 in other respects. Scutage was taken as late as 1385, and then fell out of use, while the three customary aids, although apparently they came under the provisions of the statute,

[1] Stubbs, *Const. Hist.* § 257. [2] Ibid. § 259.

continued to be taken much longer. Custom is hard to overcome, but parliament had really purchased a great increase in power.[1]

But it was not merely in the control of direct taxation that parliament grew; it was equally active in the matter of customs. The customs consisted of (1) the ancient custom and prisage of wine, (2) the subsidy on exported wool, or new custom, (3) tunnage and poundage.[2] The ancient custom was an export duty, granted by the first parliament of 1275, of half a mark upon each sack of wool or every three hundred woolfells, and of one mark on every last of leather.[3] This and the prisage upon imported wine became a part of the hereditary revenue of the crown. By express exception they did not fall under the provisions of Confirmatio Cartarum.[4]

In 1303 arose the new custom, which, in return for certain privileges conceded by Edward I to the foreign merchants, was granted by them to the king. It was an addition to the ancient custom of 10*d.* on each sack of wool or three

[1] On the whole matter of direct taxation, see Stubbs, *Const. Hist.* § 275.

[2] 2 Anson, *Law and Cust.* 287.

[3] Stubbs, *Sel. Chart.* (8th ed.) 451.

[4] Con. Cart. vi, vii, in Ibid. 494

hundred woolfells exported and 3*d.* in the pound on all goods imported by aliens.[1] It was a palpable evasion of parliamentary claims, but technically a legal one, for although a private negotiation for money such as Confirmatio Cartarum attempted to avoid, it was a bargain with foreigners, whose interests were in no wise affected by the words of the statute. It was, for all that, contrary to the freedom of trade promised by the 41st clause of Magna Carta, a consideration nevertheless which was of slight importance at the moment in comparison with the fact that the king had seized upon a means of making him less dependent upon parliament. Naturally objection was made. Parliament petitioned for the removal of the new custom in 1309 and obtained it for a year in order that its effect upon prices might be determined, but it was restored again in 1310. During the ascendency of the Lords Ordainers from 1311 to 1322, it was again suspended, and again restored when Edward II returned to power. Thereafter the king and council went on making bargains with merchants in excess of the old rate, while parliament regularly remonstrated. But since par-

[1] 2 Anson, *Law and Cust.* 286.

liament could not control the king in his executive action, he was able with impunity to collect the custom on the basis of the agreements he had made, and parliament had to submit. An assembly of unparliamentary constitution, with the commons irregularly represented, in 1353 adopted the new custom in the Ordinance of Staples, which received parliamentary sanction in the form of a statute the following year. While parliament thus conceded a point to the king, it soon won another, for in 1362 it was enacted that neither merchants nor any other body should henceforth set any subsidy or charge on wool without the consent of parliament. Nine years later, in 1371, the law was reënacted, and the conflict was for the time at an end.[1]

The king had long enjoyed the right to seize a portion of imported wine under the name of prisage. Edward II began the custom of bargaining with the merchants for the commutation of prisage at a fixed sum for each tun in excess of the ancient levy. To this the king in council added the fixing of a custom of so many pence in the pound on other merchandise. In this way tunnage and poundage grew

[1] Stubbs, *Const. Hist.* § 259.

up. Parliament never admitted the right of the king and council in this matter, any more than in the business of the staple, and after the statute of 1371, the controversy seemed closed.[1] The parliamentary victory was for the time complete, and after the accession of Richard II there was no instance until the Tudors of an attempt at unauthorized taxation of merchandise.[2]

Even with direct and indirect taxation of the sorts mentioned in the control of parliament, the king had still other sources of revenue. He could borrow, and did so freely. First he made use of the Jews, who came under his special protection, to raise forced loans. These the lenders recouped from the people by usury, and thus the subject indirectly paid the sovereign's debts. After the banishment of the Jews in 1290, the situation was not relieved, for the king could still borrow abroad, and parliament, unable to repudiate the royal debts, must make extra grants. At home the king forced his credit upon prelates, towns, and monasteries, giving as security the next grant

[1] 2 Anson, *Law and Cust.* 287.

[2] Stubbs, *Const. Hist.* § 277; 1 Anson, *Law and Cust.* 274, 275.

in parliament or ecclesiastical convocation. When the lenders later met in council, they must either grant a tax or, what was almost equivalent, release the king. The remedy for the situation was not in increased parliamentary control of taxation, but in restraint of the royal and national expenditure and in control of the executive.[1]

The prerogative found another source of income in the custom of purveyance which had come down from the most ancient times. Originally based upon the duty of the country to support the king and his retinue during his progresses, it had been extended and abused by kings who required it for the benefit of others than themselves and upon occasions when they could not legally require it for themselves. Purveyance included the taking of provisions, the compulsory use of horses and carts, and the enforcement of labor for prices set by the purveyor or for nothing at all. The payment, if any, was in tallies, the amount of which was deducted from the purveyee's next tax, so that it really amounted to taking an impost before it was granted. Parliament tried again and again to abolish purveyance, and finally in

[1] Stubbs, *Const. Hist.* § 278.

1362 succeeded in doing away with it except for the personal use of the king and queen.[1]

One other source of income Dr. Stubbs mentions. This was the system of commissions of array, by means of which the king impressed men for military service at the cost of the shires or townships. Sometimes this was made the basis of a tax by commutation. It was enacted in 1352 that no one not bound by tenure should be compelled to furnish armed men unless by authority of parliament. The statute was confirmed during the reign of Henry IV, but the abuses were not entirely restrained.[2]

While parliament was thus confirming in practice its theoretical right to supremacy in every branch of taxation, an important change was taking place in the manner of granting taxes, which resulted in the best safeguard of its privileges which parliament has in this department. At first the taxes were granted separately, and sometimes in different amounts, by the barons and commons, while the stipendiary clergy taxed themselves outside of parliament. From the end of the reign of Richard II, parliamentary taxes were voted by the com-

[1] Stubbs, *Const. Hist.* § 279.

[2] Ibid. § 280.

mons with the advice and consent of the lords.[1] Not only did the two houses become as one in their financial relations with the king, thus gaining greater power of resistance to prerogative, but the initiative in taxation was also transferred from the king to the commons. Henry IV was forced in 1407 to declare the right of both houses to deliberate apart from the interference of the king upon the amount of a tax, that neither house could report on a grant until both were agreed, and that then the report should be made by the mouth of the speaker of the commons.[2] From the demand of the king for a certain sum and the formal consent of his barons, to the determination by the poorer taxpayers of the commons as to the amount which should be given, — that was the wonderful growth, in a nation where habit was almost the strongest moulder of affairs, of only two centuries.

All this advance of parliament in taxative power carried with it a great mass of legislation, which went of course to strengthen that assembly as a law-making body. But parliament did not confine itself to matters directly touching taxation; by means of grants of money

[1] Stubbs, *Const Hist.* § 438. [2] Ibid. § 315.

it purchased a share in all sorts of legislation and gradually established itself as the supreme legislative body. A good illustration of this is found in the proceedings of the year 1340. As the condition of large grants in addition to the generous ones already given for the French war then in progress, parliament petitioned for certain reforms, which were accepted by the king and embodied in four statutes covering a wide range of legislation. The first of these, besides reform in the tax on wool, secured the abolition of presentment of Englishry, regulated the appointment of sheriffs, dealt with the local courts, limited purveyance, and enlarged the functions of the judges at Nisi Prius, who had succeeded the itinerant justices. The second, already referred to, forbade the impost of any charge or aid except by the consent of parliament. The third declared that the assumption by Edward III of the title of king of France should never bind English subjects to the French crown. The fourth protected the clergy against abuses of royal right.[1]

But the parliamentary victory could not be won solely by forcing the king to assent to pe-

[1] Stubbs, *Const. Hist.* § 257.

titions for specific laws. Several obstacles remained in the way of advance, and we must see how these were disposed of. First of all these obstacles was the remnant of legislative power which the crown for a time persisted in keeping. Throughout the history of England, even from Saxon times, the king had been the law-maker. He had, it is true, usually, if not always, sought the consent of certain of his subjects, and we have seen how this consent ranged from mere formality to something of reality. He had also from time to time asked advice, and sometimes counsel had come unsought; but always he, or his ministers in his behalf, had initiated and enacted the laws. It is not surprising, therefore, that when the theory of consent to legislation had become established, even when that theory demanded that consent be given in a representative assembly, ancient custom should sometimes be adhered to by the king in legislation. In a time of transition, confusion is only natural. We find, only five years before the model parliament of 1295, the enactment of so important a statute as the Quia Emptores in an assembly composed of the king's immediate council and the baronage. Edward III held Great

Councils which usurped the functions which then theoretically belonged to parliament.[1] But such assemblies were rare and presented a small problem compared with the legislative power exercised by the king in his continual council, where were made ordinances of full and equal authority with the statutes made in parliament.[2] Here was a practice subversive of the principle of 1295 that "that which touches all should be approved by all," [3] a practice which continued in spite of the legislation of 1322 invalidating ordinances and declaring that "the matters which are to be established for the estate of our lord the king and of his heirs, and for the estate of the realm and of the people, shall be treated, accorded, and established in parliaments by our lord the king, and by the consent of the prelates, earls, and barons, and the commonalty of the realm." [4]

As a partial remedy for the situation, parliament insisted upon a clear distinction being made between statutes and ordinances. A stat-

[1] 2 Anson, *Law and Cust.* 85.

[2] Stubbs, *Const. Hist.* § 232.

[3] Writ II, Stubbs, *Sel. Chart.* (8th ed.) 484.

[4] Stubbs, *Const. Hist.* § 254.

ute was an act of the crown, lords, and commons, engrossed in the statute roll and regarded as a permanent addition to the law. It was revocable only by another statute made in parliament. An ordinance, on the other hand, was an act of the king, usually in council. It was temporary and revocable at any time by the king or the king in council. It was not engrossed, but was issued in the form of letters patent. This distinction seems to have been well understood after 1354. An irregular assembly of the previous year, virtually a Great Council, had made the Ordinance of Staples. Remonstrance was at once made, and in the parliament of 1354 it was established, in return for the enactment of the ordinance as a statute, that such matters must henceforth be dealt with by statute.[1] The crown continued nevertheless to abuse the right to make ordinances, especially in the time of Richard II, who, when petitioned by commons in 1390 that the chancellor and council should not after the close of parliament make any ordinance contrary to the common law or ancient custom of the land and to the statutes enacted by parliament, evasively replied

[1] 1 Anson, *Law and Cust.* 211–213.

that what had before been done should be done still, saving the prerogative of the king. This was one grievance which led to Richard's deposition.[1] Notwithstanding the extreme tenacity of prerogative, parliament made marked advance against royal legislation, and even though it could not entirely do away with ordinances, was yet able to limit them. Much was gained in this respect by the change of procedure in parliamentary legislation.

The early procedure was an even greater obstacle to the growth of parliament than the independent legislation of the king. In the beginning statutes were drafted and enacted by the crown, or the crown in council, on petition of parliament. This petition was usually presented by the commons, which thus gradually came into a position where it could initiate legislation as well as taxation. Before the petition was tendered, the king had probably stated his need of money, so that the grant of taxes, as we have seen, was often made dependent upon the king's favorable answer to the petition. But though parliament claimed that grievances should precede supply, the king's promise of redress might be all they could get.

[1] Stubbs, *Const. Hist.* § 292.

Even the return of an apparently satisfactory answer often proved of little avail, for it might be ambiguous. Nor was a clear answer always sufficient, for the statute based upon the petition was framed and enacted by the king and council, usually after the adjournment of parliament. The crown was thus left with the real key to the situation and often found it convenient to forget entirely that there had been either petition or answer. Undoubtedly some statute was usually engrossed, but the wishes of parliament were often defeated by variations, exceptions, and saving clauses. Even when the statute was enrolled as desired, the king might still repudiate it, or at least suspend its operation in whole or in part or grant pardons for its infringement.[1]

Parliament naturally used all its efforts to overcome these obstacles. It demanded that the king's answers be in writing and sealed; it made a condition to grants of supply that petitions as exhibited be affirmed.[2] In the year 1414 the commons petitioned that no law be made by addition or by diminution which by any

[1] 1 Anson, *Law and Cust.* 15, 16, 18, 214–216; Stubbs, *Const. Hist.* §§ 290, 369.

[2] 1 Anson, *Law and Cust.* 216.

manner of terms should change the sentence and the intent asked. Henry V answered that "from henceforth nothing be enacted to the petitions of his Comune that be contrarie of their asking, whereby they should be bound without their assent; saving alway to our liege lord his royal prerogative to grant and deny what him lust of their petitions and asking aforesaid." [1]

This marked a great step in advance, and reduced the king to the mere right of approval or disapproval, a situation of affairs which became permanent when, by the end of the reign of Henry VI, it became customary for legislation to be initiated in the form of a bill. Henceforth legislation purports to be not by "consent" or "at the request of the commons," but "by the authority of parliament." [2]

The legislative prerogative had now fallen to the power of formal assent or dissent. The king and his subjects had changed places; the one, who had once had the initiative and enactive authority, had parted with it for the empty right of consent which the others had possessed two brief centuries before.[3] One

[1] 1 Anson, *Law and Cust.* 216; Stubbs, *Const. Hist.* § 325.

[2] 1 Anson, *Law and Cust.* 217; Stubbs, *Const. Hist.* § 290.

[3] 1 Anson, *Law and Cust.* 220.

step only remained before the crown lost even what it then retained; but that lies beyond our inquiry, in the time when the cabinet system made it unwise, and hence practically impossible, for the king to veto a bill, and reduced him to a right of assent which is the valueless vestige of one-time supremacy.[1]

Parliament was not satisfied merely to have power in taxation and legislation, but also reached out into other departments of national affairs. This was the case in judicial matters. The three common law courts of King's Bench, Exchequer and Common Pleas had been cast off from the Curia Regis and become independent benches during the reign of Henry III,[2] and had absorbed all the work of the local popular courts except small cases.[3] As early as the Articuli Super Cartas of 1300 we see parliament dealing with the common law courts and regulating their jurisdiction,[4] and there was from time to time much legislation concerning the justices of assizes.[5] The upper house of parliament became a court of appeal from errors of law in

[1] The veto has not been exercised since the early part of the eighteenth century. Stubbs, *Const. Hist.* § 441.

[2] Stubbs, *Const. Hist.* § 233.

[3] Ibid. § 236.

[4] Ibid. § 181.

[5] Ibid. § 235.

the common law courts, and has remained so to this day. When these courts could not do justice because of the "might on one side and the too great unmight on the other," or because they had no rules of law applicable to the case, the king's extraordinary jurisdiction was invoked by petition to the royal council. It very early became the custom to refer the equitable matters (that is, cases where the rules of common law could afford no remedy) to the chancellor, and before the end of the reign of Edward III that officer ceased to follow the person of the king, and the Court of Chancery was formed, as the common law courts had been.[1] Other extraordinary jurisdiction the council still retained and exercised in two ways: (1) by issuing special commissions of oyer and terminer, (2) by summoning accused persons before the council. After repeated remonstrances by parliament, the former was, before the time of Richard II, abandoned. The latter survived and was at times used with salutary effect against powerful offenders whom no jury would have dared to convict, but the system was open to great abuse. Hence parliament repeatedly

[1] Dicey, *Priv. Coun.* 13–17; 2 Anson, *Law and Cust.* 413; Stubbs, *Const. Hist.* § 234.

tried to transfer the jurisdiction of the council to the common law courts or at least to control the council, but all in vain. The system survived, and caused parliament trouble in succeeding centuries.[1] Parliament did, however, in the Middle Ages have a general oversight of judicature, and its claims to regulate the council and to control the choice of justices show growth.[2]

So too parliament had won a share in general deliberation concerning national policy and matters of peace and war by the middle of the fourteenth century.[3] It became generally pretty independent of the king, who, while opening and closing the sessions, could not attend debates.[4] The document of the middle of the fourteenth century called Modus Tenendi Parliamentum, when it spoke of the king's obligation to attend the sessions,[5] looked backward to a time when the crown was the supreme legislator and forward to the time when parliament, instead of requiring the formality of presence, would be so independent as to re-

[1] Dicey, *Priv. Coun.* 69.

[2] Stubbs, *Const. Hist.* § 295; 2 Anson, *Law and Cust.* 19, 20.

[3] Stubbs, *Const. Hist.* §§ 257, 294.

[4] Ibid. § 444.

[5] Stubbs, *Sel. Chart.* (8th ed.) 510.

sent it. As a further indication of parliamentary independence, the theory ran that all petitions must be discussed before the king could prorogue the assembly.[1] The power of the crown to call and dismiss parliament was also limited by statutes providing that parliaments be holden every year once, and more often if need be. As a matter of fact they were frequently intermitted,[2] but parliament was evidently on the road of growth.

Even more transcendent powers with relation to the crown were assumed by parliament. Edward II was in 1327 declared by the legislature to be unfit to reign, while his son was declared worthy and the king was forced to resign.[3] Richard II, after his defeat by Henry of Lancaster, offered to resign. A parliament was called, which, after accepting the resignation and drawing up a recital of Richard's abuses of prerogative, his illegal exactions, and his claim to sole legislative power, formally deposed him.[4] In 1404 and 1406 parliament passed acts settling the succession to the crown.[5]

[1] Stubbs, *Sel. Chart.* (8th ed.) 512, 513.
[2] 1 Anson, *Law and Cust.* 246.
[3] Stubbs, *Const. Hist.* § 255.
[4] Ibid. § 269. [5] Ibid. § 313.

These were followed by a repeal in 1460, when it was enacted that the crown should go to the Duke of York at the death of Henry VI.[1] After the duke's usurpation and Henry's return to power in 1470, there was a restorative act of parliament.[2] When Edward IV regained the throne soon after, he did not find it necessary to consult parliament about his title, yet Richard III, on assuming the crown in 1483, thought it politic to get his claim confirmed by the legislature.[3] All of these acts of parliament represented popular acquiescence in the rising of a new power rather than any definite choice of a new king, but the fact that parliament was repeatedly appealed to as the perfector of a title shows how its authority had increased.

One other respect in which parliament reached out for power demands consideration. The right to supremacy in the laying of taxes, although important, was really only half of the stake in the battle over taxation. Although the people might theoretically say what they would grant and when they would grant it, yet if the king and his ministers were free to spend money as they chose, the demands upon the people which for the national honor they must

[1] Stubbs, *Const. Hist.* § 354. [2] Ibid. § 358. [3] Ibid. § 361.

meet would be so excessive as to rob their right of much of its value. The solution was some sort of ministerial control by parliament. This fact was early recognized, yet it is strange that the first step in this direction was taken by the king, and stranger yet that those who would most benefit by such control refused to assume it.

As early as 1237 Henry III, when in great need of money, offered to allow the aid which he desired from the Great Council to be spent by a commission elected by the barons and prelates. He was refused and next offered to dismiss all his counselors and to accept as advisers three nobles named by the barons. Finally it was arranged that three barons be added to the king's council.[1] This seems to be the first instance of any suggestion of direct control in ministerial action by the people, although the election of ministers had before been attempted by the Great Council. Pembroke had been so chosen regent at a time when Henry III was too young to make any choice, and in 1226, before the king emancipated himself, Ralph Neville had received the chancellorship by the assent and common counsel of the kingdom, upon the understanding that he should

[1] Stubbs, *Const. Hist.* § 174.

not be removed except by the same authority. Ten years later Neville refused to resign unless required by the body which had elected him.[1]

These precedents were not of the greatest weight, because made during Henry's minority, but they do not stand alone. Other demands for the election of ministers were made in succeeding years. Thus, in 1244, the Great Council proposed the appointment by that body of the justiciar, treasurer, and chancellor as the condition of a grant, but the suggestion came to nothing.[2] An elective ministry was demanded and refused repeatedly during Henry's remaining years. It was a feature of the Provisions of Oxford, but was omitted from the reënactment in the Statute of Marlborough.[3] In 1310 a Great Council forced upon Edward II an elected commission, called the Ordainers, by which his authority was superseded until 1322. These Ordainers provided for the filling of the great offices of state by the king, with the counsel and consent of the baronage. The ministers were to be bound by oaths in parliament, and proper persons were to be named to hear complaints against the king's officers. The re-

[1] Stubbs, *Const. Hist.* § 171.

[2] Ibid. § 175.

[3] Ibid. §§ 176, 177.

form was not permanent, for the commons, except in hearing the oaths, had no share in the matter.[1] Indeed, election of ministers was not the manner by which parliament was to get control of the executive, although it did not cease its attempts in this direction.

The year 1341 found Edward III in financial difficulties which forced him to grant and seal a statute requiring the chancellor, judges, and other great officers to be named by the king in parliament and there sworn, but Edward immediately revoked it in council and got the next parliament to repeal it.[2] A similar demand was made in 1371 as to the greater officers.[3] An ordinance of 1377 provided that during the minority of Richard II the great officers of state should be chosen in parliament, a concession which was the condition of a grant for the French war.[4] In 1381 parliament secured the resignation of the chancellor and the appointment of a new one.[5] Four years later, however, Richard refused to name his intended ministers in parliament,[6] and it is

[1] Stubbs, *Const. Hist.* § 251.
[2] Ibid. §§ 258, 259.
[3] 2 Anson, *Law and Cust.* 18, 19.
[4] Stubbs, *Const. Hist.* § 263.
[5] Ibid. § 264.
[6] 2 Anson, *Law and Cust.* 19.

doubtful if the ordinance passed for his minority ever amounted to more than formal nomination by the king in parliament and unquestioning acceptance by that body.[1] Meanwhile the council had become a power coördinate with the king, necessary to the transaction of all the business which he did and acting often as a check upon him. To the demand for nomination of ministers in parliament, the commons now added a similar requirement as to the members of the council. During the minority of Henry VI this ideal was temporarily realized, but when that king became of age, the council ceased to be named in parliament and the commons no longer strove in this manner to control it.[2]

The attempt to control the election of ministers was no more efficacious than the requirement of oaths in parliament, yet it was, as Sir William Anson remarks, "a curious anticipation of modern practice." What parliament tried to do directly in the fifteenth century, it came to do indirectly under the cabinet system three hundred years later. "The modern par-

[1] Stubbs, *Const. Hist.* § 286.

[2] Stubbs, *Const. Hist.* § 367; 2 Anson, *Law and Cust.* 20, 21.

liament is content with the power of making it impossible for the crown to employ others than those whom parliament favours for the time."[1]

Another method of ministerial control was used with some slight success very often in the fourteenth century, and that was the appropriation of grants of money to particular uses.[2] This carried with it from time to time the bringing of the accounts into parliament, and there grew up a custom of audit which did much to put the ministry under parliamentary control. It was an important provision of the statute of 1341, already referred to, that commissioners be elected in parliament to audit the accounts of the officers who had received money for the king.[3] In the Good Parliament of 1376 an audit was demanded by the speaker,[4] and in the last parliament of Edward III in 1377 the commons petitioned for the appointment of two earls and two barons as treasurers to secure the proper expenditure of the subsidy granted. Later in the same year the first parliament of Richard II secured the appointment of two treasurers to spend the money then granted,

[1] 1 Anson, *Law and Cust.* 17.
[2] Stubbs, *Const. Hist.* § 287.
[3] Ibid. § 258. [4] Ibid. § 262.

but John of Gaunt took the subsidy out of their hands. The next parliament, however, forced the account of the subsidy to be shown, and in 1379, the king being still in sore straits conceded that a committee of retrenchment be elected.[1] The commons objected in 1406 to making a grant before the account of the last subsidy was audited. Henry IV replied, "Kings do not render accounts," but in 1407 he voluntarily laid them before parliament. The right of audit was never again formally contested by the crown.[2]

The audit was the strongest influence which parliament could in the Middle Ages bring to bear upon the ministers, because it was supplemented by the right of impeachment. This was first exercised by the Good Parliament of 1376, which took advantage of Edward's dire need for supply for the French war to represent that the country was impoverished by the counselors of the king, and that if the king would do justice to the offenders he should have sufficient money. Charges against Latimer, the king's chamberlain, and Lyons, his agent with the merchants, were made by the commons and sustained at the bar of the lords.

[1] Stubbs, *Const. Hist.* § 263. [2] Ibid. § 371.

The ministers, and with them some other offenders, were condemned to imprisonment and forfeiture, but were restored after parliament was dismissed by John of Gaunt.[1]

Just ten years later came the second impeachment, that of Michael de la Pole, the chancellor, for alleged maladministration. This too was secured because parliament refused otherwise to grant money. Another condition of the grant then made was the appointment of a council of reform to regulate the royal household and the realm. Richard II had to consent, but immediately induced five of the justices to declare that parliament had no right to remove his servants and that the commission was unlawful as contrary to prerogative. War followed, Richard was forced to submit, and in the next parliament, held in 1388, the justices themselves fell under the third impeachment.[2] When Richard declared himself of age in 1389, he asserted his right to choose his own ministers, and did in fact replace a number, but the effect of the impeachments was seen when in 1390 the chancellor, treasurer, and councilors resigned and offered them-

[1] Stubbs, *Const. Hist.* §§ 262, 263.

[2] Ibid. § 266.

selves for censure to parliament, which, finding no fault with them, allowed them to retain their offices.[1] Although politics and personal dislikes played a large part in the history of impeachment, the ministers learned that, if parliament were alive to its power, they had somebody besides the king to reckon with, and that the people had in their hands a sanction by which they could enforce faithfulness in office.

We have in this chapter traced a very great growth in parliament as a body which was not confining its activity to its own department of taxation and legislation, but was growing as well in deliberative powers and in control of the judiciary and executive. We have seen an assembly which was fast becoming, as the representative of the people, the real sovereign of the realm, supreme in all departments. What of the share of the landed man in this? It must be confessed that there was next to nothing in all this remarkable constitutional development of the fourteenth and fifteenth centuries which was done by the landed man as such. That incentive which taxation had afforded him to assert rights against the king had apparently passed away with the transfer of the

[1] Stubbs, *Const. Hist.* § 267.

great burden of taxation from land to chattels and from direct taxes to customs. And yet the men who were most influential in the nation continued to be the great landowners, partly because the feudal system was not entirely decayed, partly because the inertia of custom kept in their hands the power which their special interests had before won for them, and yet more because of the control which as landlords they could still exercise over their tenants. Although the incidence of taxation changed, we have again and again had occasion to see how the granting of money continued to be the pivot of almost every conflict between crown and parliament. Perhaps, after all, the landed man had more at stake in the matter of indirect taxation than his fellow men. It was not the merchants upon whom the subsidies fell, but the consumer. Roughly speaking, the wealthier a man the more he would consume and the heavier the charge he must bear. The great wealth of the nation was still in land, despite the large increase in trade. Hence it may be argued that the large landowners continued to be the class upon which the bulk of the final burden of taxation fell. Of course the burden might rest far more easily

upon their shoulders than upon those of the poor, but such had been the case when direct taxes only were employed. So practically the position of the landed man as the one most largely interested in the matter of taxation had changed but little.

The apparent change, however, deprives us of the clear point of contact between the landed man acting in the interest of his land and the advance of liberty which we have heretofore been able sometimes to indicate. We cannot therefore say that this movement or that was inaugurated to protect the enjoyment of landed rights, but we can say that the landed man was continually shaping and controlling the growth of the Middle Ages, even though his motive may not have been the protection of his land. This will be clearly seen if we examine the matter of qualifications for membership in parliament and for the exercise of the elective franchise.

Of the upper house of parliament there can be little question, for the lords were distinctively a body of large landowners. They were the barons and church dignitaries who had long had the right to attend the Great Council. Tenure was the original basis of the right of

membership in the upper branch, and summons early became added. Then the right to be summoned became hereditary and passed from father to son as the land did. Sometimes it may have happened that men without the large territorial holding called a barony were summoned and transmitted membership to their descendants, but it cannot be doubted that with few exceptions the lords, both lay and spiritual, had very large landed estates.[1] It was the barons who, in the time of which we have been treating, took the lead in the constitutional struggle. Aside from the influence which they had as landlords, their superior wealth and social position had made them men of greater culture and business aptitude than their fellows. Besides this, they realized their position and felt the responsibility which it laid upon them, while the people on their part looked to them as leaders.[2]

Since the leaders were landed men, it seems hardly necessary to consider the standing of the followers, but among them, too, we shall find a preponderance of landowners; hence it will be well to carry our investigation further.

[1] Stubbs, *Const. Hist.* §§ 190, 201.

[2] Stubbs, *Const. Hist.* § 475; 1 Anson, *Law and Cust.* 16.

The represented clergy were for the most part men whose only substance was in the tithes which came to them. As landed men they therefore had no importance, but on the other hand they early ceased to have any influence in parliament, preferring to have no more to do with national affairs than by their representatives in convocation to grant taxes for themselves. We are therefore obliged to consider only the commons, the representatives of shire and borough, and here we meet questions of considerable obscurity. The two classes of representatives will best be taken up separately and approached through the medium of the men who elected them.

We have no absolute knowledge as to who were the electors of the knights of the shire in the fourteenth century. Looking back to the previous century, however, we find evidence that elections were held in the full county court, and such must have continued the theory, for in 1406 a statute was enacted requiring knights henceforth to be elected, as before, by the free choice of the county court, notwithstanding any letters or any pressure from without.[1] The purity of county elections had been

[1] Stubbs, *Const. Hist.* § 313.

assailed, possibly by the return by the sheriff of knights without election.[1] Such abuses were the basis of a petition in 1376 that the knights of the shire be chosen by common election from the better folk of the shires, and not merely nominated by the sheriff without due election.[2] So undoubtedly the theory, despite abuses, was that the full county court should be electors. There is some doubt whether the smaller freeholders exercised their franchise in the earliest times. Later it seems certain that as a practical matter the county elections were controlled by the great landlords of the shire. The mesne tenants were much under their influence when they attended the court, and often they stayed away altogether.[3] If any unlanded men attended, and it is doubtful if any did, they too must have had little independent influence. The knights whom the county elected could not therefore fail to be men who themselves had a great deal of land or were in sympathy with landed interests.[4] The preponderant influence of landed men was well illustrated

[1] Stubbs, *Const. Hist.* § 296.

[2] Ibid. § 262. [3] Ibid. § 217.

[4] After 1445, no knight could be returned unless he had land of annual value of £20.

by the refusal of parliament in 1381 to approve the promise made by Richard II that villeinage should be abolished.[1] The great landlords were determined to keep the upper hand. This jealousy of their influence extended even to the desire to keep others from gaining the power which accompanied land, for in 1391 parliament petitioned the king to forbid villeins to advance themselves and their descendants by acquiring land or educating their children. Fortunately the petition was denied.[2] Finally, in 1430, the county franchise was by statute definitely confined to freeholders of 40*s*. income. That this limitation of the electorate to landowners did not, as a practical matter, disfranchise anybody of any influence is proved by the fact that the complexion of the knights returned was not changed. Probably indeed only landowners had voted before.[3]

The borough franchise and the borough representatives, it is likely, were scarcely less under the control of landed interests. In the matter of the franchise, however, there is much obscurity, for there was no uniform type of borough. The town meeting was formed upon

[1] Stubbs, *Const. Hist.* § 264.
[2] Ibid. § 267. [3] Ibid. § 335.

several different plans. In one place it included all of the householders, in another all who paid "scot and lot" (a contribution or rate for local and national purposes), in another those who held by burgage tenure, in still another the members of the merchant or trade guilds. Sometimes the election was not in town meeting, but by the municipal government.[1] The ancient basis was undoubtedly tenure, and a large proportion of the electors always continued to claim their franchise under some sort of real-estate holding. The better men would undoubtedly usually be elected, and if they were "better" according to the old tradition, they would be freeholders. In any event, the landed men very likely predominated with very few exceptions during the Middle Ages over the electorate and the representatives of the boroughs. The petitions of the Good Parliament in 1376 for the enforcement of the Statute of Laborers limiting wages, for the restriction of the right of common in towns, for the limitation of the powers of chartered crafts, may prove either or both of two propositions: (1) that the burghers were less powerful than the landed men in parliament, (2) that the landed

[1] Stubbs, *Const. Hist.* § 212.

men overshadowed the burghers at home.[1] The whole parliamentary organization of the Middle Ages was in the control of the landed man, who therefore must be accounted a prime factor in all the constitutional growth which we have been reviewing.

Another argument, although more briefly stated, is of still more importance. History, we must always remember, is the record of development, the sequence of cause and effect. One stage of the growth of English liberty we have been studying in this chapter, and so far we have sought its explanation only in the influence of contemporary landed men. Great as this influence undoubtedly was, we might almost disregard it and depend for the strength of our argument upon a cause more remote but no less potent. The developments of the Middle Ages were the resultants of all that had gone before, and particularly of the principle of representation in taxation which the landed man had established for the protection of his real property. It mattered not at all, so firmly was that principle grounded by its authors, that the incidence of taxation to a considerable extent changed. A rule so broad in

[1] Stubbs, *Const. Hist.* § 262.

theory must find the broadest application. Hence, because landed men in the interests of their land had raised a cry of "no taxation without representation," the merchants and burgesses of the Middle Ages enjoyed, as a matter of course, the similar right as to personal property and indirect taxation. Even had the balance of power in the Middle Ages passed from the landowners to their humbler brethren, the landed man would still have been the chief cause of the effects which we have lately been tracing. Let it be borne in mind, now and throughout the later discussion, that contemporary causes, while important, are really secondary to the first cause of earlier times, — the landed man acting in the interests of his land.

VIII

THE FINAL STRUGGLE FOR LIBERTY

THE Middle Ages saw parliament coming into a supremacy which seemed almost won, but in consequence of internal dissension the final victory was deferred for two hundred years. Just as the constitutional rule of the Lancastrian kings began to give promise that popular rights were becoming fixed, the Wars of the Roses disturbed the growing security of liberty. The Yorkist kings tended to the exercise of arbitrary power, and even had they not, the progress of civil war would alone have been sufficient to interrupt the rule of constitutional principles. The Tudor monarchs did indeed restore the constitutional forms, yet their reigns were in fact those of absolute sovereigns.

The general temper of the subjects of the Tudors was that of men who had lost not so much their high ideals of liberty, as the energy to enforce their rights. They were satisfied with the formal recognition of sorely won franchises, and regularly exercised them in

subservience to the wishes of the crown. This indifference was the result of the exhaustion in which the Wars of the Roses had left the people. The feudal nobility having been broken to pieces and their ranks sadly depleted by the sword of war and the axe of execution,[1] the commons were deprived of their long-time leaders. Unable by themselves to rise in resistance to prerogative, all that they desired was to be left alone to pursue the arts of peace; hence they were quite ready to uphold the skilful administrative hands of the Tudors. The church was thus the only power left to oppose the crown, and the reformation soon turned all its great influence to the support of the king who became its new head.[2] It was not until the increase of commerce and the great prosperity which followed new discoveries had enabled the middle classes to become rich and acquire land, until they and the older landed gentry grew to have an independent spirit which raised new leaders, and until the intellectual impulse of printing and the Reformation had aroused the nation at large to a fresh realization of the value of lib-

[1] Dicey, *Priv. Coun.* 77, 78.

[2] Dicey, *Priv. Coun.* 79, 86, 87; 1 Anson, *Law and Cust.* 20.

erty, — it was not until then that the subject was again able to claim for his own benefit the liberties the Tudors had kept only formally alive.

The way in which the Tudors controlled every branch of the government and made all popular influences subservient must be seen in order that we may fully realize the scope of the reaction for liberty in Stuart times. In legislation the Tudors resorted to parliament in many important matters, and indeed might have done so with safety in all, for the legislature always obediently passed the measures which the crown proposed. But it was found convenient for the king in council to issue independently proclamations which had the force of statutory law. This form of legislation was used more frequently and sweepingly than its long-disused progenitor, the ordinance. By it were created new laws, new criminal offenses, and new punishments, which found rigorous enforcement in the Star Chamber. Parliament became sponsor for this system by enacting in 1539 that such proclamations "should be observed and kept as though they were made by an act of parliament." A repeal of the Statute of Proclamations in the first year of Edward VI

made no real change, for although the courts under Mary declared that proclamations could not impose any new fine, forfeiture, or imprisonment, nor make a new law, both Mary and Elizabeth continued the evil.[1]

In the raising of taxes the crown in Tudor times was equally independent of parliament. Henry VII was so successful in his unconstitutional exactions that during the last seven years of his reign he had to call parliament but once. One of his great sources of income was the "benevolence." In 1473 Edward IV had instituted this impost by calling for "freewill offerings" from subjects who were unable to refuse to be benevolent. The parliament of Richard III attempted in 1484 to stop this abuse by a statute forbidding the exaction, but within a few months Henry VII succeeded to the throne and restored the tax.[2] Another Tudor exaction was the "loan," which was repeatedly required. One instance of this will sufficiently illustrate its nature. In 1588 Elizabeth and the Privy Council ordered the Lords

[1] 1 Anson, *Law and Cust.* 260, 261; Dicey, *Priv. Coun.* 92, 93.

[2] Stubbs, *Const. Hist.* §§ 359, 361, 373; Gneist, *Eng. Parl.* 199.

Lieutenant of the counties to return lists of such men as could afford to loan sums of £25 and more to the crown, the amounts for which each could be held to be reported. On the basis of these returns requisitions under the privy seal were sent to individuals, and refusal to pay put one at the mercy of the Star Chamber.[1]

Nor were benevolences and forced loans the sole means by which the Tudors showed their absolutism in taxation. Parliament allowed Henry VIII to take more subsidies than all his predecessors had raised.[2] Under Mary and Elizabeth not only did it readily grant when asked; it permitted the crown to deal with the customs without even asking its leave. After the regular granting of tunnage and poundage began in 1373, there was no demand by the sovereign for customs in addition for over one hundred and fifty years. Then Mary laid a duty on cloths exported and French wines imported without parliamentary consent. Elizabeth took an impost on sweet wines through-

[1] See for the letter of the council and requisition, Prothero, *Select Statutes and Other Constitutional Documents Illustrative of the Reigns of Elizabeth and James I* (2d ed.) 134–137.

[2] Gneist, *Eng. Parl.* 199.

out her reign and there was never a protest.[1]

The crown was also absolute in the department of administration. The judges were subservient, parliament was subservient, the officers of state and the Privy Council were subservient. Only now and then did parliament make any complaint of fiscal and other ministerial abuses.[2] Impeachment was never resorted to. The council, no longer composed of men of high nobility and great landed wealth, was a tool of the crown.[3] Such a body could readily be used for oppression in public business, but it was in its judicial phase, as the Court of Star Chamber, that the Privy Council became the most effective instrument of the king. In this court was exercised all the indefinite residual jurisdiction of the crown. At first its action was beneficent in that it gave cheap and ready redress to the poor against the rich, but it soon degenerated into a tribunal for the enforcement of proclamations, for the punishment of political offenders, for the

[1] 1 Anson, *Law and Cust.* 274, 275; Prothero, *Sel. Stat.* (2d ed.) lxxiii.

[2] Gneist, *Eng. Parl.* 200.

[3] Dicey, *Priv. Coun.* 85; 1 Anson, *Law and Cust.* 20, 21; 2 Ibid. 23.

restraint of free speech. "No rank was exalted enough to defy its attacks, no insignificance sufficiently obscure to escape its notice." [1] It tried everything from petty police matters up to libel, from alleged seditious speeches and writings down to private family and neighborhood quarrels.[2] It interfered with common law causes pending by arbitrarily imprisoning suitors and officers of the law.[3] Its process was terrible. On a charge based upon hearsay or secret information, the offender might be privately accused, arrested, and arraigned. Without being confronted with his accuser or being sufficiently informed of the nature of the offense, he might be pressed, even tortured, to confess. A confession led to immediate sentence, while a refusal to answer brought imprisonment until more formal proceedings could be had. These were begun by a bill of complaint addressed to the council and signed by a councilor, after which subpoena issued. Upon his arraignment the prisoner was put upon oath and asked to answer the

[1] Dicey, *Priv. Coun.* 95.

[2] Ibid. 105–112.

[3] See the complaint of the judges in 1591, Prothero, *Sel. Stat.* (2d ed.) 446.

bill. If he refused, he was summarily committed. If he answered, he was then examined by the plaintiff upon written interrogatories, and indefinite imprisonment was the penalty of a refusal to reply to any of them. After the prisoner had completed his answers, witnesses for the plaintiff were privately examined, and then the council (when in judicial session called the Court of Star Chamber) gave sentence of fine, imprisonment, pillory, loss of ears, whipping, or anything else short of death.[1]

That a people by whom free institutions had so long ago and in so large a measure been won should for many years endure such arbitrary assumptions on the part of the crown proves the utter subservience into which they had fallen from mere exhaustion after the Wars of the Roses, and in which they were kept by the manipulations of the sovereign. The veto was not much used by the Tudors, because they packed their parliaments and kept the upper hand over them.[2] A favorite method of doing this was to enfranchise new boroughs. Edward VI added 22 members to the commons, Mary 14, Elizabeth 62; and thus a strong court

[1] Dicey, *Priv. Coun.* 102–105.

[2] 1 Anson, *Law and Cust.* 254.

party was maintained in parliament. When this was thought not to be needful, there remained the constant source of control obtained by recommending or commanding the sheriffs or electors to make returns of certain people.[1] Thus, in the seventh year of Edward VI the sheriff was enjoined to return certain persons pointed out by the king. The writs of the second year of Mary called for "men of the wise, serious, catholic sort." Elizabeth secured the election to parliament of many court officials and other dependants.[2]

In spite of the general subservience of the commons, there were occasional sparks of hope in the tenacity with which they claimed certain privileges for the house. A contested election in 1586 was decided by the Lord Chancellor and the judges, but commons refused to accept the decision and itself investigated the returns. Its conclusions were the same as those of the other tribunal, but were ex-

[1] 1 Anson, *Law and Cust.* 284, 285.

[2] Gneist, *Eng. Parl.* 196. Elizabeth and the council in 1570 appointed Archbishop Parker and Lord Cobham to confer with the sheriff of Kent, the officers of boroughs, and other leading men for the seemingly virtuous purpose of securing that "the persons to be chosen may be well qualified." Prothero, *Sel. Stat.* (2d ed.) 441.

pressed to be "not out of any respect the said House had or gave to the resolution of the Lord Chancellor and Judges therein passed, but merely by reason of the resolution of the House itself, by which the said election had been approved." It was also resolved that "there should no message be sent to the Lord Chancellor, not so much as to know what he had done therein, because it was conceived to be a matter derogatory to the power and privilege of the said House." [1] Late in Elizabeth's reign, however, we find the Privy Councilors in the commons and thirty other members canvassing and reporting contested elections, so that the privilege of the house to judge the returns and qualifications of its own members was not perfectly freed of crown interference.[2]

About the privilege of free speech in parliament there was much difference between Elizabeth and the commons. In 1566 the queen ordered the commons to cease the discussion of her marriage. This aroused a remonstrance, and Elizabeth withdrew her command.[3] Yet in 1571 she enjoined parliament not to meddle

[1] Prothero, *Sel. Stat.* (2d ed.) 130.
[2] Ibid. 118. [3] Ibid. 118.

with matters of state except such as were propounded to them. The commons fared better when in the same year Mr. Strickland was forbidden by the crown to attend parliament because he had offered a bill against the prerogative of the crown. A remonstrance that the accused ought to be made to appear and answer for his offense (if any) at the bar of the house caused the removal of the inhibition.[1] Only five years later Peter Wentworth in a speech in the commons made the astounding proposition that the queen was under the law, that a part of the law was freedom of speech in parliament, and hence that the queen had no right to repress it. Elizabeth's reply was the commitment of Wentworth to the Tower.[2] A similar speech by the same offender in 1587 was punished in the same manner.

From the year 1541 the speaker at the opening of the session regularly claimed for the members of the house freedom of discussion, free access to the person of the sovereign, and freedom from civil arrest.[4] The commons soon began to try its own members when charged

[1] Prothero, *Sel. Stat.* (2d ed.) 119.
[2] Ibid. 121, 122. [3] Ibid. 123, 124.
[4] For a sample of such claim, see Ibid. 117.

with an offense, yet Elizabeth often imprisoned members arbitrarily.[1] The crown never fully acceded to the speaker's claims and almost always denied them flatly. Parliament, in the view of the Tudor kings, had no power of initiative in taxation and legislation, and could do no more than answer yes or no to the crown's propositions. Commoners who too freely claimed larger privileges were summoned before the council, committed to prison, and forbidden to attend until further notice.[2] The kingly position cannot more clearly be expressed than in the words of Elizabeth, who in 1593 replied to the customary demands for privileges, "Privilege of speech is granted, but you must know what privilege you have; not to speak every one what he listeth, or what cometh in his brain to utter that; but your privilege is *aye* or *no*." [3]

The whole matter of the prerogative was a vexed question. Not only was there, as to

[1] Gneist, *Eng. Parl.* 201, 202.

[2] 1 Anson, *Law and Cust.* 140.

[3] Prothero, *Sel. Stat.* (2d ed.) 124, 125. How little real freedom of speech was possible in England is shown by the fact that during Elizabeth's reign at least ten statutes were enacted touching treason and seditious words, while the council passed several Star Chamber ordinances for censorship of the press.

where the prerogative began and where it ended, a doubt which was more and more bringing the crown and parliament into dispute, but there was also on the part of the sovereign a continuous insistence that, whatever its bounds, prerogative was not to be discussed by the legislature. Even in the commons there was a serious division of opinion as to the extent to which parliament might go in the matter of checking the crown. In 1601 there was an earnest debate in the commons as to whether parliament could by statute restrict the trade monopolies which Elizabeth had granted her favorites. Sir Francis Bacon said that such legislation was unconstitutional and that the only remedy was petition and grant by the queen. Parliament did not have to test its rights, however, as Elizabeth became somewhat alarmed and promised to withdraw all patents of monopolies not for the good of the people.[1]

From the foregoing bare outline something of the serious problem before the lovers of liberty at the opening of the seventeenth century must be apparent. But we have not yet, perhaps, seen how deep seated in the mind

[1] Prothero, *Sel. Stat.* (2d ed.) 116.

of royalty the notion of prerogative had become. Since the Reformation had brought the church under the domination of the king there had grown up under the teaching of ecclesiastics that theory of divine right which made prerogative not merely a political right, but also a sacred attribute which it were almost blasphemy to question. This theory found in the Stuarts most vigorous adherents, and the problem of prerogative grew in gravity. Fortunately for our liberties, the increase in the claims of royalty was met by a larger claim from the subject for political rights and a persistent denial on the part of the new sects of Puritans and Non-Conformists of the assumption by royalty of quasi-divinity. The words of James I himself will serve to bring before our minds the real fashion of the new garment which prerogative had assumed.

"Kings are not only God's lieutenants upon earth and sit upon God's throne, but even by God himself they are called gods. . . . As to dispute what God may do is blasphemy, . . . so is it sedition in subjects to dispute what a king may do in the height of his power. . . . I will not be content that my power be disputed upon. . . . Do not meddle with the

main points of government: that is my craft: . . . I must not be taught my office. I would not have you meddle with such ancient rights of mine as I have received from my predecessors. . . . All novelties are dangerous." [1] And to the judges James said: "First, encroach not upon the prerogative of the crown. . . . That which concerns the mystery of the king's power is not lawful to be disputed; for that is to wade into the weakness of princes, and to take away the mystical reverence that belongs unto them that sit in the throne of God. Secondly, that you keep yourselves within your own benches. . . . As for the absolute prerogative of the crown, that is no subject for the tongue of a lawyer, nor is lawful to be disputed. It is atheism and blasphemy to dispute what God can do: good Christians content themselves with his will revealed in his word, so it is presumption and high contempt in a subject to dispute what a king can do, or say that a king cannot do this or that; but rest in that which is the king's revealed will in his law." [2]

[1] Speech of James I before parliament, March 21, 1610. Prothero, *Sel. Stat.* (2d ed.) 293. The commons replied by a petition claiming the right of free speech in discussing the prerogative wherever it affected the subject. Ibid. 296.

[2] Speech in Star Chamber, June 20, 1616. Ibid. 399.

Over against this assumption of absolutism stood the new-risen middle class which now became the power of first importance in the battle of liberty. The commons, although growing in influence during the Middle Ages, was then always led by the barons. For a century and a half they had been leaderless, and, from lack of experience and energy, quite powerless to check the aggressions of royalty. Now they had increased in substance and intelligence, while leaders of the highest ability had risen from their own ranks. It was this well-to-do middle class, of landed possessions neither the largest nor the smallest, which bore the brunt of the battle in parliament; even as, supported by the smaller landowners down to the 40*s.* freeholders, it stood in the peace system and jury system of the counties as the final bulwark of civil liberty.

The very first commons of James I, composed of just such men,[1] showed in its apology to the king[2] a true grasp of the difficulty of their position. "What cause we your poor

[1] There were 231 knights, 140 esquires, 71 gentlemen, 9 wholesale merchants, 1 mayor, 9 aldermen, 4 doctors of law, 1 sergeant at law. Gneist, *Eng. Parl.* 212.

[2] Prothero, *Sel. Stat.* (2d ed.) 286, 289.

Commons have to watch over our privileges, is manifest in itself to all men. The prerogatives of princes may easily, and do daily grow: the privileges of the subject are for the most part at an everlasting stand. They may be by good providence and care preserved, but being once lost are not recovered but with much disquiet." The words were truly prophetic of what was soon to take place.

This same first parliament won through a compromise a notable victory. James in his proclamation [1] for the election of the commons had instructed the sheriffs to return no bankrupts or outlaws. Sir Francis Goodwin was returned from Bucks and, being an outlaw, was rejected by the clerk of the crown, who issued a new writ on which Sir John Fortescue was returned. Parliament was of the opinion "that the freedom of election was . . . extremely injured" [2] and declared Goodwin elected. The ensuing dispute between crown and parliament ended in a compromise; neither contestant was seated, and a new election was had.[3] Never again, however, did the crown question

[1] Prothero, *Sel. Stat.* (2d ed.) 280.

[2] See the Apology, Ibid. 286, 289.

[3] For proceedings, see Ibid. 325–331.

the right of the commons to judge the returns of its members.[1]

As his predecessors had done, James tried to create a court party in parliament, but popular opinion had grown so intense that he had to depend for the carrying out of his arbitrary will upon extra-parliamentary acts. He made in council proclamations for the censorship of the press, and these were enforced in the Court of Star Chamber.[2] By proclamations also "he interfered with personal liberty and freedom of trade, bidding country gentlemen to leave London and go and maintain hospitality in their own houses, forbidding the increase of buildings about London, and the making of starch out of wheat."[3] Sir Edward Coke, when asked by the council for his opinion upon such proclamations, replied that: (1) a proclamation could not change the law or create a new offense, (2) the king had no prerogative but what the law allowed, (3) the king might admonish all subjects to keep the laws, and neglect of such a proclamation would aggravate the offense, (4) the prohibition of an act

[1] 1 Anson, *Law and Cust.* 151.

[2] See examples in Prothero, *Sel. Stat.* (2d ed.) 394, 395.

[3] 1 Anson, *Law and Cust.* 261, 262.

not punishable in the Star Chamber could not make it punishable there.[1] Proclamations were nevertheless continually issued, but after the abolition of the Star Chamber the abuse died out, since the remaining tribunals, the common law courts, assumed the attitude of Coke.[2]

James most offended his parliaments by his proclamations imposing extraordinary taxes. As had always been the case, the battle was hottest where taxation was concerned. Unable to keep his expenditures within the limits of parliamentary grants, James by letters patent increased the duty on tobacco from 2*d.* to 6*s.* 10*d.* a pound, and upon currants from 2*s.* 6*d.* to 7*s.* 6*d.* One merchant, named Bates, was rash enough to refuse to pay the additional tax on currants, and, when proceeded against in the Court of Exchequer, pleaded the statute granting 2*s.* 6*d.* The subservient judges decided for the crown, upon the ground that foreign trade was a matter of general policy falling within the discretionary power of the king, whose wisdom in its exercise was not to be disputed by a subject.[3]

[1] 12 Coke's Reports, 74, 76.

[2] 1 Anson, *Law and Cust.* 263.

[3] 2 State Trials, 371; Lane's Reports, 22.

This was in 1606. James was so much encouraged that two years later he arbitrarily raised the duties upon all sorts of merchandise. In 1610 his needs forced him to call another parliament, which stood upon its ancient rights and petitioned "that all impositions set without the assent of parliament may be quite abolished and taken away" and that a law be made declaring such impositions void.[1] As a result the illegal taxes were for a time reduced, but only for a time.

James also made use of benevolences. One taken in 1622 well shows the evil nature of the thing. The judges, sheriffs, and justices of the peace were commissioned to approach men of means and "to move them to join willingly in this contribution in some good measure." As those who did not join were to be reported to the council, the "free will" of the givers must have been very small.[2]

The character of the reign of James I is well illustrated by the events of 1621. The commons revived its right to impeach ministers with the trial of Lord Chancellor Bacon for corruption.[3] It also assumed to deliberate on

[1] Prothero, *Sel. Stat.* (2d ed.) 302.
[2] Ibid. 359. [3] Ibid. 334.

several public questions. The king thereupon forbade parliament to "meddle with anything concerning our government or deep matters of state." [1] To this the commons protested that the crown was not absolute as to religion and legislation, that parliament was the highest court of the country wherein there should be freedom of speech and the decision of contested elections.[2] James adjourned the parliament,[3] tore the protest from the journal of the house with his own hands, and arrested several members. Out of all the turmoil stands one fact: while parliament had not really won many victories, it had reached the point of intelligent and emphatic protest.

The conflict became still more bitter during the reign of Charles II, whose excesses led to a violent swinging of the pendulum to the opposite extreme of lawlessness where a faction of the people, and not the king, ruled unconstitutionally. The trouble began with the first parliament of the new king in 1625. The war with Spain required a good deal of money, but the commons were cautious and granted only two small subsidies. What offended the king

[1] Prothero, *Sel. Stat.* (2d ed.) 310.
[2] Ibid. 311, 313. [3] Ibid. 314.

most was that, instead of granting him tunnage and poundage for life as had been done in late reigns, parliament voted it for only a year. Dissolution was the method by which the king expressed his feelings. The second parliament in 1626 served Charles no better, for instead of granting money, it began to inquire into grievances, especially the corruption and extortions of the Duke of Buckingham. The king in a speech warned the commons, "Remember that Parliaments are altogether in my power for their calling, sitting, and dissolution; therefore as I find the fruits of them good or evil, they are to continue or not to be." [1] Notwithstanding the threat, Buckingham was impeached,[2] whereupon the king dismissed parliament.

Charles pretended to think himself so aggrieved by the carelessness of the commons for the national support that he was justified in getting money as best he might.[3] He ordered the collection of a free gift [4] and of a forced

[1] Gardiner, *The Constitutional Documents of the Puritan Revolution* (2d ed.) 4, 6.

[2] Ibid. 7–44.

[3] See his statement in the commission for a forced loan. Ibid. 51.

[4] Ibid. 46.

loan,[1] and sent out a commission for the levying of tunnage and poundage as it had been taken at the time of James I's death.[2] These illegal exactions were enforced by means of billeting soldiers upon the people, the use of press-gangs, and imprisonment by the Star Chamber. Five knights who had been so imprisoned for refusing to make a forced loan in 1627 applied, under their common law right, for a writ of Habeas Corpus. It was returned with the indorsement, "confined by the special mandate of the king." The case was carried before the Court of King's Bench, where, numerous precedents for such despotic action having been adduced, the applicants were denied the writ and deprived of trial by jury.[3]

Public resentment and the lack of money forced the king in 1628 to call his third parliament. In spite of another royal threat, the commons again turned first to grievances, and after promising to vote five subsidies to the king, deferred further action while they spent two months in perfecting and passing the Petition of Right. After reciting the illegal exactions of the king and the arbitrary impris-

[1] Gardiner, *Const. Doc.* (2d ed.) 51.
[2] Ibid. 49. [3] 3 State Trials, 1, 51–59.

onment, billeting of soldiers and martial law by which they had been enforced, parliament prayed "that no man hereafter be compelled to make or yeild any guift, loane, benevolence, taxe, or such like charge, without common consent by Acte of Parliament; and that none be called to make aunswere or take such oath, or to give attendance, or be confined, or otherwise molested or disquieted concerning the same or for refusall thereof; and that no freeman, in any such manner as is before mencioned, be imprisoned or deteined; and that your Majestie would be pleased to remove the said souldiers and marriners, and that your people may not be soe burthened in tyme to come; and that the aforesaid commissions for proceeding by martiall lawe may be revoked and annulled: and that hereafter no commissions of like nature may issue forth to any person or persons whatsoever to be executed as aforesaid, lest by colour of them any of your Majestie's subjects be destroyed or put to death contrary to the lawes and franchise of the land." The king gave an unwilling assent, and parliament granted the five subsidies already promised.

The Petition said nothing expressly about

illegal customs, but parliament had not overlooked them. As a preliminary to a grant of tunnage and poundage for life, a remonstrance was presented asking that the king declare "the receiving of tunnage and poundage, and other impositions not granted by parliament, a breach of the fundamental liberties of this kingdom, and contrary to your Majesty's royal answer to the said Petition of Right." [1] This was too much for the king's patience, and parliament was prorogued.[2] During the recess of seven months Charles continued his arbitrary taking of tunnage and poundage contrary to the spirit, if not the letter, of the Petition of Right. A stormy second session of six weeks was marked by a deadlock between the king and the parliament as to alleged Popish innovations and the taking of customs. The culmination came in the resolution of the commons, made while the king's guard was clamoring at the locked door for admission in order to dissolve parliament, that those who forwarded new and Popish forms or who had anything to do with the taking or payment of tunnage and poundage not granted by parliament, were to be

[1] Gardiner, *Const. Doc.* (2d ed.) 70.

[2] Ibid. 73.

reputed capital enemies of the realm.[1] The conviction of Eliot, Holles, and Valentine, the chief sponsors of this resolution, ended the last legal proceedings ever taken for speech in parliament.[2]

After the dissolution of parliament, Charles showed a lack of good faith hardly second to that of John. The Petition of Right was wholly disregarded and the king reigned as an autocrat for eleven years. Without a parliament, with a bench and council and ministers dependent upon the king's good will for appointment and retention in office, every abuse was possible.[3] Prerogative taxation was exercised unsparingly for the financial support of the state, while the Star Chamber enforced its collection and in general overrode all attempts at the exercise of popular rights. The Puritans who opposed the king's religious proclamations and all who resisted taxation suffered fine, imprisonment, the pillory, or mutilation.

The most notable abuse of the period was the revival of ship money, which was nearly

[1] Gardiner, *Const. Doc.* (2d ed.) 82. See also Ibid. 83, the king's Declaration Showing the Causes of the Late Dissolution.

[2] 1 Anson, *Law and Cust.* 140.

[3] 2 Anson, *Law and Cust.* 27.

related to the Danegeld and had anciently been levied upon the seaport towns under the name of Shipgeld for the equipment of a navy when invasion threatened. Now the tax was laid, not only without any real pretense that the country was endangered, but also on inland communities as well as the seaboard. The form of the old levy was retained by ordering each county to fit out a ship and have it at Portsmouth on a day named. But as the king wanted money, not ships, he directed the sheriff to levy ratably upon the individual freeholders and citizens. Before the ship money was demanded from the inland counties in 1635,[1] Charles induced the subservient judges to give their opinion that the tax was valid, an opinion which was affirmed in 1637. Thus armed, the king had no cause to fear when John Hampden refused to pay his £1 and appealed to the court, which decided seven to five against the liberties of the subject. Nearly all of the judges held that the king might be forced by the necessities of defense to raise money without parliament. The majority held the king to be the only judge of the necessity, hence found that

[1] It was levied on seaports in 1634, while in 1635 and 1637 the writs were extended to the inland counties.

there was imminent danger. Berkeley went so far as to say that the king was above the law, and that a parliamentary grant was not an exercise of good will, but of absolute duty.

Professor Gneist thinks that the rock upon which this aggression finally broke was the resistance of the primary forces of popular government in the counties. The mechanism for carrying out despotism was in the last instance lacking, for the men from whom sheriffs and justices of the peace must be chosen were the well-to-do landed men, who, independent by reason of their property, firmly resisted intimidation. When aggression met this opposition, it gradually became exhausted, until finally the Scottish war found the king utterly unable to meet expenses. Then in 1640 a parliament was called.[2]

This "Short Parliament" lasted but three weeks. The king was willing to give up ship money for a large grant, but the commons refused to purchase what was deemed an ancient right. Dissolution followed, and for several months Charles continued the autocracy. But reverses in the Scotch campaign forced

[1] 3 State Trials, 825, 846, 1065–1251.

[2] Gneist, *Eng. Parl.* 219, 220.

the king to yield a point, and on November 3, 1640, the "Long Parliament" began to sit. The amount of important business done within a year was enormous. In order that the king might not again rule without a parliament there was passed the Triennial Act providing that if the king neglected for three years to call a parliament, the peers might issue writs, and that if the peers also neglected to do so, the constituencies might of their own authority elect a House of Commons.[1] It was also enacted that the present parliament should not be dissolved without its own consent.[2] The prime minister, Strafford, was first impeached and then convicted of treason by an act of attainder.[3] Ship money was by statute declared illegal, and the sentence against Hampden reversed.[4] Tunnage and poundage was granted to the king and by statute declared to be under the authority of parliament.[5] Most important of all, the chief weapons of prerogative were taken away by the abolition of the Star Chamber[6] and the Court of High Commis-

[1] St. 16 Car. I, c. 1. [2] St. 16 Car. I, c. 7.
[3] 5 Statutes of the Realm, 177.
[4] St. 17 Car. I, c. 14. [5] St. 16 Car. I, c. 8.
[6] St. 17 Car. I, c. 10.

sion.[1] With this came the restoration of the writ of Habeas Corpus.[2]

A great victory had been won and the ancient constitution restored, but matters could not stop here. Charles had assented to all this legislation with very poor grace, and showed a disposition to override it when opportunity should offer. Yet many of the constitutional party thought the work was done and failed to see that against a king ready to repudiate the unwilling affirmation he had given the acts of parliament, even more safeguards were necessary. An appeal to the people was drawn up under the name of the Grand Remonstrance,[3] which set forth the causes for fear, and recommended, among other things, new safeguards against Papists, an oath by the judges to support the Petition of Right, and the employment of sworn ministers and councilors in whom parliament could confide. This would have taken from Charles almost his last weapons of oppression. So extreme a measure was contrary, however, to the ideas of some

[1] St. 17 Car. I, c. 11. Since the time of Elizabeth, this court had in ecclesiastical matters been operating upon the same lines as the Star Chamber.

[2] St. 17 Car. I, c. 10, s. vi.

[3] Gardiner, *Const. Doc.* (2d ed.) 202.

of the more conservative opponents of the king, and the remonstrance passed by only eleven votes. Of course the king denied the petitions which accompanied the remonstrance.[1] Furthermore, he presumed so far as to have one member of the House of Lords and five members of the House of Commons impeached for treason by the attorney-general,[2] an irregular proceeding which was resented by the commons as an invasion of the peculiar privilege of beginning impeachments, which lay in that body.[3]

In its distrust of the king and well-founded fear that he would turn the army against it, parliament passed an ordinance placing the militia under parliamentary control.[4] Charles issued a proclamation forbidding any action under this ordinance,[5] but parliament declared the proclamation void.[6] Both sides now completed preparations for war, the king issuing commissions of array,[7] parliament voting to raise an army.[8] The parliamentary party, in the first stages of the civil war, included about

[1] Gardiner, *Const. Doc.* (2d ed.) 233.
[2] Ibid. 236.
[3] Ibid. 237.
[4] Ibid. 245.
[5] Ibid. 248.
[6] Ibid. 254.
[7] Ibid. 258.
[8] Ibid. 261.

two thirds of the nation, the larger part of the prosperous towns and the free peasantry. It had a good portion of the nobility, but its leaders were not so much nobles as men, like Hampden, of the landed gentry, and Cromwell, of the solid middle class. The royal party contained about half of the nobility and old gentry.[1]

The parliamentary party, already forsaken by many of the more conservative men who had at first opposed the king, was soon even more seriously divided. In the army there was a preponderance of men holding the extreme Puritanical and Independent views of religion and politics. Although really a minority in the nation, they were yet able, as the military force in time of war, to exercise an overwhelming authority. Charles's unbroken claim to divine right throughout the strife and his evident lack of intention to better his ways finally forced the army to extremes. Imbued as they were with the religious idea, the Puritans were able to say that the right of the ruler, so far as it was divine, was founded in grace, and to draw the conclusion that if the ruler sinned, he fell from grace and lost the right to rule. It was

[1] Gneist, *Eng. Parl.* 221.

even said that there was such a thing as high treason of the king against the people. The Puritans have been termed fanatical, and it may be admitted that they were, at least in the sense that they were in advance of their time.

Finally it seemed to the army that the only solution of the difficulty was to put its new theory into execution and to rid the country of the king. The majority of the commons refused to depart from the kingly idea, and on December 6, 1648, declared for terms of peace by a vote of 120 to 83. Upon this the army imprisoned 47 members and forbade 96 others to attend parliament. The minority of the commons left continued to sit as the "Rump Parliament," and on January 6, 1648–9, passed an act [1] erecting a court before which Charles I was tried and convicted of treason.[2] The same "parliament" abolished the office of king,[3] did away with the House of Lords,[4] and declared the people of England to be a "Commonwealth and Free State." [5]

Although Cromwell was an able adminis-

[1] Gardiner, *Const. Doc.* (2d ed.) 357.
[2] Ibid. 371–380.
[3] Ibid. 384.
[4] Ibid. 387.
[5] Ibid. 388.

trator and the first ruler of his time, government by the minority was fated from the beginning to shipwreck. Parliamentary government was desired and sought by the Protector, but was impossible while the majority opposed the new régime. Military rule was therefore the only expedient to keep out royalty. Under it discontent arose and increased. The middle class could fight, but had neither the native ability nor the experience in national affairs to mould the constitution anew. The conservative landed gentry who had been justices of the peace offered a hostile police administration. If they were displaced by the newer men of inexperience, lack of authority resulted. The conservatives were also too well represented upon the juries for the ordinances of the Rump to be well enforced. A military government was imperatively required, or the innovators must fall. The army required money, and that meant high taxes. The county administration found difficulty in collecting them, and military assessment was resorted to. As the juries often refused to convict those who declined to pay their taxes, a Court of High Justice on lines in some respects like the Star Chamber had to be erected. In 1655 eleven military gov-

ernors were put over the country with power to levy troops, collect taxes, imprison suspicious persons, and inquire into the private life of the clergy and schoolmasters.[1] The Protectorate broke when it met the resistance of the people in the counties. It was just there that Charles I had come to grief, as must every man or movement that is supported by only a minority.

The restoration of the Stuarts to the throne after the popular extremes of the Commonwealth and Protectorate was naturally followed by so great a reaction that some extremes of prerogative followed, yet these were not so great as might have been feared. Charles II made no attempts to legislate in council, to collect illegal customs, or to take benevolences and forced loans.[2] He did not dare to interfere with freedom of speech or to pack the commons by creating new boroughs, so parliament found itself supreme in legislation and taxation except in so far as the king could influence its members by places, pensions, and bribes.[3]

In control of administration, however, par-

[1] Gneist, *Eng. Parl.* 226–231.
[2] Ibid. 241.
[3] 1 Anson, *Law and Cust.* 284.

liament found itself without the authority which past events showed that it needed. By means of adding appropriating clauses to grants of subsidies the commons did indeed accomplish much, but the king still had the appointment of councilors and judges, whom he kept under his personal influence.[1] The justices he used to intimidate juries for the conviction of those whom he mistrusted.[2] Charles II divided the Privy Council into committees which dealt with the separate departments of administration. Hating prolonged discussion, he limited the consideration of matters of general policy to a few men constituting a "cabinet" which became notorious under the name of "Cabal." This he used for secret negotiations with Louis XIV, from whom he obtained money for remaining neutral in the conflict between France and Holland, although parliament favored the latter. These abuses aroused the commons to undertake again the impeachment of ministers. Charles then turned his attention to methods of controlling parliament. Unable to corrupt the members, he tried to corrupt the electorate, but with small suc-

[1] Gneist, *Eng. Parl.* 242, 243.

[2] Ibid. 246, 247.

cess in the counties. In the boroughs he succeeded better. There the electorate had always been subservient to the landed gentry, and now the king substituted himself as the paramount influence. His method was ingenious: by means of proceedings in the nature of *quo warranto*, town privileges were declared forfeit, and new charters were granted with municipal boards revocable by the crown. Yet an attempt was made in 1679 to obtain a Privy Council which should act in harmony with parliament. Sir William Temple organized a council of thirty, including a number of parliamentary members, but this rapidly divided into special committees, with a small inner group discussing general affairs outside of the meeting of the whole. Just as before, there was an irresponsible cabinet. Never again was there an attempt to get a responsible Privy Council, and that body soon ceased to be an important part of the constitution.[1]

The last stage of the struggle for liberty came in the few years when James II was king. The particular abuse of prerogative of which he was guilty was the exercise of the dispensing

[1] Gneist, *Eng. Parl.* 244–246, 249, 250; 2 Anson, *Law and Cust.* 95–97; Dicey, *Priv. Coun.* 135–142.

and suspending powers. Dispensations had always been granted by the crown from the operation of penal laws, and often of necessity, for sometimes inconvenience or hardship would arise if the laws were enforced in particular cases which arose while parliament was not in session to offer a remedy. But the abuses had far surpassed the advantages of the exercise of such power, for it had been oftenest used for the favorites of the king and for the upbuilding of the personal influence of the crown. Pardons had been freely granted for all sorts of offenses, even petty crimes.[1] The case of Thomas v. Sorrell,[2] decided by Vaughan, C. J., in 1673 laid down the rule that a dispensation from a penal statute might be granted, before or after an illegal act, in the case of an *individual* breach by which no man was injured, or in case of a *continuous* breach of a penal statute enacted for the sole benefit of the king.

As a preliminary to what seems to have been a campaign for the restoration of Catholicism by an army officered by Romanists, James, by the dismissal of some judges and the ap-

[1] 1 Anson, *Law and Cust.* 265, 266.

Vaughan's Reports, 330.

pointment of more servile ones, got a bench which would declare for prerogative. He then commissioned Sir Edward Hales, a Catholic, to be colonel, and dispensed with the statutory oath of conformity to the English Church. The collusive action of Godden v. Hales,[1] which was brought to recover the penalty of £500, was decided by eleven of the twelve judges in favor of the dispensing power. The statute in question not being for the sole benefit of the king but for the protection of the nation against Papacy, the decision cannot be reconciled with that of Thomas v. Sorrell.[2] The king followed up his advantage by the appointment of Catholics as Privy Councilors and holders of benefices, and those who resisted his interference in the latter cases were deprived of office by the authority of a Court of Commissioners for Ecclesiastical Causes erected by James, in defiance of statute, upon the lines of the old High Commission.

But the king did not confine himself to dispensing with the oath of supremacy in particular cases. Under cover of a "Declaration for Liberty of Conscience" he assumed to sus-

[1] 2 Shower's Reports, 475; 11 State Trials, 1165.

[2] 1 Anson, *Law and Cust.* 270.

pend the operation of the penal statute entirely. Such an odious claim to superiority to the law was insufferable, and yet, when the question of its legality was collaterally raised before the King's Bench in the Seven Bishops' Case,[1] the judges divided two and two. The vital point was well stated when Powell, J., said, "If this be once allowed of, there will need no parliament," but the danger of a Catholicized standing army was undoubtedly the immediate cause of popular indignation against the king and of the Revolution of 1688. This revolution was accomplished without the extremes which attended the overthrow of James's father, and consequently it brought to a close the long struggle between the people and the prerogative. Constitutional progress has indeed been made since then, but the main principles defining the rights of the people found final statement in the Bill of Rights passed by the Convention Parliament in 1689. This act declared, as ancient rights and liberties:

"1. That the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal.

"2. That the pretended power of dispens-

[1] 12 State Trials, 183.

ing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.[1]

"3. That the commissions for erecting the late Court of Commissioners for Ecclesiastical Causes, and all other commissions and courts of like nature, are illegal and pernicious.

"4. That levying of money for or to the use of the crown by pretense of prerogative, without grant of parliament, for longer time or in other manner than the same is or shall be granted, is illegal.

"5. That it is the right of the subject to petition the king, and all commitments and prosecutions for such petitioning are illegal.

"6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

"7. That the subjects which are Protestants may have arms for their defense suitable to their conditions, and as allowed by law.[2]

[1] See infra, clause 12. The possibility of such abuse of prerogative being again declared legal by a packed court was removed by the Act of Settlement, Stat. 12 and 13 Will. III, c. 2, s. iii (7), to the effect that judges be removable only by address of both houses of parliament.

[2] The right of self-defense by weapons had, in this time of

"8. That elections of members of parliament ought to be free.[1]

"9. That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament.

"10. That excessive bail ought not to be required nor excessive fines imposed; nor cruel and unusual punishment inflicted.

"11. That jurors ought to be duly impaneled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

"12. That all grants and promises of fines and forfeitures of particular persons before conviction, are illegal and void.

"13. And that for redress of all grievances, and for the amending, strengthening, and preserving of the laws, parliament ought to be held frequently." [2]

fear of Popery, to be restricted to those who would not use them to overthrow the state.

[1] Corruption in elections is always possible so long as the electorate lacks civic interest or morality. It did not cease with the Bill of Rights. The abolition of rotten boroughs in 1832 practically ended the chance of corruption by the crown.

[2] The Triennial Act of the Long Parliament was repealed in 1664 as subversive of prerogative in allowing writs to issue from other sources than the crown. In its place, it was enacted that

Reference has several times been made to the cabinet system. Although the struggle for liberty really ended with the Bill of Rights and the cabinet is a later development, its importance, as the means by which parliament got control of the executive and strengthened itself in legislation and taxation, seems to demand some consideration. After the Revolution of 1688, the commons deprived the king of the sole right to control the expenditures of revenue by extending the principle of appropriation first used under Charles II. The king was given an allowance, called the civil list, to meet the expenses of the household and civil departments, while parliament each year gave its consent (as required by the Bill of Rights) to the maintenance of the army and navy, at the same time voting the sums required and paying them out. Parliament thus kept the executive always under scrutiny.

The new power of the commons made it

the sitting and holding of parliament should not be intermitted for over three years. The Triennial Act of 1694 required the crown to issue writs within three years after the close of each parliament. The prerogative still lies with the king, but he is directed by statute to exercise it and is compelled to call parliament annually, otherwise he would have no standing army and (without appropriations) could not pay two thirds of the nation's charges. 1 Anson, *Law and Cust.* 246–248.

necessary for the king to choose ministers who would be approved by the majority of parliament and would act in accordance with its wishes. The king has since 1688 found the support of the majority essential. In theory his ministers are still his servants, "but they are chosen for him by the unmistakable indication of the popular wishes at the polling booth or in the division lobby." Because the king must have a majority to pass the Army Bill and appropriations, he must defer to the popular desires as to ministers and their policies.

So, too, deprived of a packed parliament and the dispensing power, he may initiate through his ministry only such legislation as the majority will approve. If he dislikes a bill passed by parliament, he must yet approve it, hence there has been no veto for nearly two centuries. His only chance of defeating legislation, and that is a small one, is to dismiss the ministry which insists upon its passage and appoint a new one. If the new ministry is not supported by parliament, then the legislature may be dissolved and an appeal made to the people. But the newly elected parliament may prove to be unfavorable to the king, and then he must yield to its will, for its friend-

ship is indispensable.[1] Besides confirming parliament in its claims to control legislation, taxation, and administration, the cabinet system has also decided the problem, which arose in connection with the dispensing power, as to who should act in emergencies when there is no parliament. Now that the executive is answerable to parliament, he and his ministers may safely be allowed to go forward and do what circumstances demand.[2]

Again the question arises as to the influence of the landed man upon the events of Tudor and Stuart times which made the people the real sovereign power of the nation, and established definitively those principles of liberty which are to-day enjoyed by the citizens of England and the United States of America. We have already seen that the landed men of the middle class became the leaders in the popular movements of the Stuart period, and that in the counties they offered the resistance which finally broke down alike the despotic monarchy of Charles I and the military dictatorship of the Protector. It may be added that the character of the electorate and the quali-

[1] 1 Anson, *Law and Cust.* 27, 254, 255; 2 Ibid. 34–39.

[2] 1 Ibid. 283.

fications for membership in parliament had remained without change from mediæval times. Sir Thomas Smith, in his *Commonwealth of England*, written in 1565, enumerated four classes of men. First came the barons, of an annual revenue of £1000; secondly, the knights of a yearly income of £40 from free lands and the esquires and lesser gentlemen "who can live idly and without manual labour." All these were of the gentry. Thirdly, there were the yeomen, *legales homines*, of the annual income of 40*s*. from free land. Finally, the author mentioned "the men which do not rule," those "which have no free land. These have no voice nor authority in our commonwealth, and no account is made of them, but only to be ruled." [1]

In the Middle Ages, it was the first of these classes which furnished the leaders in the battles for liberty, but we have already seen how the barons lost their predominance in the nation and how the cause of liberty languished until the second class developed powers of leadership and mastery. Two thirds of the earls and barons of 1640 had been created

[1] Smith, *The Commonwealth of England* (ed. 1589) bk. i, chaps. 17–24, quoted in Prothero, *Sel. Stat.* (2d ed.) 176.

within a generation. Among them could not be found the strong independence which would assert itself against royal aggression. On the other hand it has been estimated that the combined income of the members of the House of Commons of the Long Parliament was £400,000, and that their landed property was three times greater than that of the lords.[1] Truly the landed man was still in power when the final battles were fought, even though his motive had doubtless ceased to be so largely the protection of his land as it anciently had been. And yet the landed man did at times act for selfish ends, as when in 1660 he secured the abolition of military tenure and, instead of substituting a land-tax, made up the deficiency in taxation by an excise on beer. That the last-named action was taken by a plurality of two votes indicates, however, a more catholic spirit than had once been abroad.

While political power had been descending the territorial scale, it did not pass from the gentry. Although the lords were no longer of overshadowing influence, the landed gentry were the ruling class and generally controlled the lower class of the electorate. Deprived of their

[1] Gneist, *Eng. Parl.* 257, 258.

power in borough elections by the new charters of Charles II, the gentry resumed it when James II withdrew the charters and restored the old order of things. The merchant class, although they had grown to great wealth, never had in parliament a representation which could make itself overwhelmingly felt, and only in London and a few other large trade towns did they much influence the electorate.[1] To Sir William Temple's mind, one of the great advantages of his council was the wealth of its members, for "authority is observed much to follow land." [2]

Nor has the landed man since then entirely lost his preponderant influence in the nation. The reform acts of the nineteenth century, while greatly enlarging the electorate, have left it in the hands of owners, users, and inhabitants of lands, houses, and lodgings of certain values,[3] so although there is practically a near approach to manhood suffrage, the land-idea has not yet entirely passed. And even as the landed gentry of the seventeenth century had

[1] Gneist, *Eng. Parl.* 259–261.

[2] Temple, *Memoirs* (ed. 1720) 233; cited, Dicey, *Priv. Coun.* 140.

[3] 1 Anson, *Law and Cust.* 91, 102–108.

a preponderant influence in politics in spite of the fact that others might vote, so now, with a franchise extended below the freeholders, the landed gentry retain a power greatly disproportionate to their numbers. The landed man who stood as a leader in the winning of civil liberty stands to-day as perhaps its most conservative and powerful defender.

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